

United States
Circuit Court of Appeals
For the Ninth Circuit.

DOUGLAS FIR EXPLOITATION & EXPORT
COMPANY, a Corporation,

Plaintiff in Error,

vs.

W. LESLIE COMYN and BENJAMIN F. MACK-
ALL, Copartners Doing Business Under the
Firm Name of COMYN, MACKALL & COM-
PANY,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

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change Building, San Francisco, California,
Attorneys for Defendant.

In the Southern Division of the District Court of
the United States for the Northern District of
California, Second Division.

No. 16,127.

W. LESLIE COMYN and BENJAMIN F. MAC-
KALL, Copartners Doing Business Under
the Firm Name of COMYN, MACKALL &
CO.,

Plaintiffs,

vs.

DOUGLAS FIR EXPLOITATION & EXPORT
COMPANY, a Corporation,

Defendant.

Complaint.

Plaintiffs complain of defendant, and for cause of
action allege:

I.

The plaintiffs are, and at all the times herein mentioned were, copartners doing business under the firm name of Comyn, Mackall & Co., and plaintiff Benjamin F. Mackall is, and at all the times herein mentioned was, a citizen of the state of California and a resident of the Southern Division of the Northern District of California, and plaintiff W. Leslie Comyn is, and at all the times herein mentioned was, a citizen of the United Kingdom of Great Britain and a resident of the Southern Division of the Northern District of California.

II.

Douglas Fir Exploitation & Export Company is, and at all the times herein mentioned was, a corporation organized and existing under the laws of the State of Washington, and a citizen and resident of said State.

III.

On, to wit, November 2, 1916, plaintiffs and defendant [1*] entered into a written contract for the purchase and sale of lumber, in manner as follows: Defendant wrote to plaintiffs a letter as follows, to wit:

*Page-number appearing at foot of page of original certified Transcript of Record.

“DOUGLAS FIR EXPLOITATION & EXPORT
CO.,

260 California Street.

San Francisco, Cal., November 2, 1916.

Messrs. Comyn, Mackall & Co.,

310 California St.,

City.

Sold prior to October 11, 1916.

Gentlemen:—

This will confirm sale to you of four cargoes Fir
F.A.S. mill wharves as follows:

‘W. H. Marston’ 1300 M October to December, 1917.

‘W. H. Talbot’ 1000 M “ “ , 1917.

‘W. H. Talbot’ 1000 M “ “ , 1917.

(Quotations subject to change without notice.

All agreements are contingent upon the acts of
God, riots, strikes, lock-outs, fires, floods, acci-
dents, inability to secure cars, transportation or
other causes of delay beyond our control.)

and two of your own vessels to be named later, with a
combined capacity of 1450 M, both for loading Octo-
ber to December, 1917, cargo to be furnished F.A.S.
vessel at loading ports at 60 M daily in Puget Sound,
Columbia or Willamette Rivers, Gray’s Harbor and
Willapa at our option, but one loading port only for
each vessel, loading port to be named by us in ample
time to give vessel instructions before leaving her
next previous port of call.

Tally and inspection by Pacific Lumber Inspection
Bureau at loading port; Certificate to be furnished
and to be final. Price \$9.50 base ‘G’ list less 2½%,

4 *Douglas Fir Exploitation & Export Company*

21½% cash. Marking if required, distinguishing mark at 10¢ per M. extra cost.

Written in duplicate. Please approve and return one copy.

Very truly yours,

DOUGLAS FIR EXPLOITATION & EX-
PORT COMPANY,

By A. A. BAXTER,
General Manager.

AAB-D.”

Thereupon plaintiffs endorsed on one copy of said letter their written approval and confirmation thereof and delivered said copy so approved and confirmed to defendant. [2]

IV.

On December 15, 1916, defendant notified plaintiffs that it would deliver the 1,300,000 feet of “Fir” specified in said contract as a cargo for the “W. H. Marston” at the mill wharf of the Knappton Mill & Lumber Company, at Knappton, Washington, which said wharf is situated on the Columbia River. On said 15th day of December, 1916, defendant sent plaintiffs an instrument entitled “Acknowledgment of Order,” in words and figures as follows, to wit:

ACKNOWLEDGMENT OF ORDER.

“Douglas Fir Exploitation & Export Co.,
260 California St.,
San Francisco, Cal.

Date December 8, 1916.

Our No. 38, page 1.

Your Order No. —.

Dated —.

Knappton Mills & Lumber Company.

Sold to—Comyn, Mackall & Company.

For account of—

To be delivered at—Knappton, Wash.

For reshipment to—

Time of shipment—October to December, 1917.

Time of delivery— do

Mill tally and inspection to govern and to be final. Agreements are contingent upon the acts of God, strikes, lockouts, fires, floods, accidents, inability to secure cars, transportation or other causes beyond our control. This is a confirmation of your order as we understand it. Please check each item with your original order and advise us promptly of any errors. Read carefully the special notes in our price list. Shipment will be made as per this confirmation irrespective of original order unless advised to the contrary by you.

SCH. ‘W. H. MARSTON.’

1,300,000 feet B. M. 15% more or less to suit capacity of vessel.

PRICE: \$9.50 Base ‘G’ List, Less 2½% & 2½% for cash.

DESTINATION: Australia. (Usual Australian Specifications.)

GRADE: As per "G" List, P.L.I.B. Certificate to be furnished.

DELIVERY: 60 M feet per working day or pay demurrage as provided by Charter-party.

MARKING: Marking if ordered, 10 cents per M, Net Cash. [3]

SHIPMENT: October to December, 1917.

TERMS AND CONDITIONS: As per 'G' List.

NOTES: This price is for delivery F.O.B. Mill Wharf, Knappton, within reach of vessel's tackles and/or on barges A.S.T. Mill Wharf, Knappton, Wash."

and defendant on said 15th day of December, 1916, requested plaintiffs to sign their acceptance of said order, and thereupon plaintiffs signed their acceptance of said order and forthwith forwarded said signed acceptance of said order to defendant.

V.

That the figures and letter 1300 M mean, and were at all the times herein mentioned understood by plaintiffs and defendant to mean, 1,300,000 feet.

That the phrase f. a. s. mill wharf means, and at all the times herein mentioned was understood by plaintiffs and defendant to mean, free alongside mill wharf.

That the phrase f. o. b. mill wharf means, and at all the times herein mentioned was understood by plaintiffs and defendant to mean, free on board mill wharf.

That the phrase on barges a. s. t. mill wharf means, and at all the times herein mentioned was understood by plaintiffs and defendant to mean, on barges at ship's tackle mill wharf.

That the phrase "G" List means, and at all the times herein mentioned was understood by plaintiffs and defendant to mean, a certain schedule of lumber prices published by Pacific Lumber Inspection Bureau, Inc., for the purpose of furnishing a basis for the quotation of prices, and by said Bureau designated as "G" List. A copy of said "G" List is hereunto attached as Exhibit "A." [4]

VI.

On October 23, 1917, plaintiffs notified defendant that on November 25th, 1917, they would take delivery of said 1,300,000 feet of "Fir" in accordance with the terms of said contract at the wharf specified by defendant.

VII.

On November 25, 1917, plaintiffs were ready, willing and able to take delivery of said lumber according to the terms of said contract, at the place specified by defendant, and prepared to take delivery thereof and had barges and stevedores present on said day at said place to so take delivery, and plaintiffs on said day had performed, and have ever since performed, all the conditions required of plaintiffs by said contract prior to and for the delivery of said lumber to plaintiffs.

VIII.

Defendant, however, failed and refused to deliver said 1,300,000 feet of "Fir," or any part thereof, at said wharf, to plaintiffs on said day, or on any other day, and notified plaintiffs that it would not deliver said 1,300,000 feet of "Fir," or any part thereof to plaintiffs at said wharf, and ever since

said day has failed and refused, and does now refuse, to deliver to plaintiffs said 1,300,000 feet of "Fir," or any part thereof, free on board said wharf, or on barges free alongside said wharf.

IX.

Plaintiffs expended the sum of Three Hundred and Four Dollars (\$304) in preparing to take delivery of said lumber as above set forth.

X.

On December 7, 1917, defendant purchased 1,300,000 [5] feet of "Fir" at the price of \$22.50 net Base "G" List, said "Fir" to be delivered f. a. s. mill wharf on the Columbia River. Said purchase price was, at the time of said purchase, a reasonable price for said "Fir," and was at said time the prevailing market price in San Francisco of "Fir" for delivery f. a. s. or f. o. b. mill wharf, and/or on barges a. s. t. mill wharf at the loading ports in Puget Sound, Columbia or Willamette Rivers, Grays Harbor or Willapa, and was also at said time the prevailing market price of "Fir" at said loading ports.

XI.

The difference between the contract price of said "Fir" and the price finally paid by plaintiffs, as in the foregoing paragraph set forth, is the sum of Seventeen Thousand Five Hundred and Eleven Dollars (\$17,511), and by the failure of defendant to deliver said lumber to plaintiffs, plaintiffs have been damaged in the sum of Seventeen Thousand Eight Hundred and Fifteen Dollars (\$17,815).

WHEREFORE, plaintiffs pray judgment against

defendant in the sum of Seventeen Thousand Eight Hundred and Fifteen Dollars (\$17,815), together with interest on said sum from December 7, 1917, to date of judgment, and for their costs herein.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiffs. [6]

State of California,
City and County of San Francisco,—ss.

W. Leslie Comyn, being first duly sworn, deposes and says:

That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters he believes it to be true.

W. LESLIE COMYN.

Subscribed and sworn to before me this 26th day of December, 1917.

[Seal]

ANNE F. HASTY,

Notary Public in and for the City and County of
San Francisco, State of California. [7]

[Endorsed]: Filed December 27, 1917. W. B.
Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

(Title of Court and Cause.)

Demurrer to Complaint.

Now comes the Douglas Fir Exploitation & Export Company, a corporation, defendant herein, and

demurs to the complaint on file herein and for grounds of demurrer shows:

I.

That said complaint does not state facts sufficient to constitute a cause of action against defendant.

II.

That said complaint is uncertain for the following reasons:

(a) It shows that the sole means provided by plaintiff for accepting delivery of the lumber was a barge, while it appears from the contract declared on that the lumber was to be delivered to a sailing ship, the "W. H. Marston," alongside the wharf of a mill to be named by the defendant.

(b) It does not show that the "W. H. Marston," named in the contract as the receiving vessel, was at the named loading port on the 25th day of November, 1917, or at any other time, and, therefore, delivery of the lumber could not have been made or tendered free alongside the wharf of the loading mill, but, on the contrary, the allegations of said complaint show that plaintiffs' preparedness to take delivery was at a place not contemplated or called for by the contract.

(c) It does not show the relevancy of defendant's alleged refusal to deliver "free on board said wharf or on barges from alongside said wharf," as such refusal would not constitute a breach of the contract, which calls for a delivery at the tackles of the schooner "W. H. Marston," either from barges alongside the mill wharf or from the mill wharf itself.

(d) It appears from the contract that it was the agreement [8] of the parties that the lumber sold was for immediate export after its delivery to the schooner, and, therefore, the allegation of plaintiffs' readiness to accept delivery on a barge or barges is a clear refutation of the agreement that the lumber was sold for immediate export.

(e) It does not show a readiness on plaintiff's part to accept delivery alongside the mill wharf of the Knappton Mill & Lumber Co., within reach of the tackles of the schooner "W. H. Marston," and/or from barges alongside said mill wharf within reach of said schooner's tackles, during some or any portion of the agreed period for delivery.

(f) It does not show a readiness to accept delivery of said lumber on the schooner "W. H. Marston," although the contract shows that the price for the lumber was based on defendant's right to make a delivery within reach of the vessel's tackles, either from the mill wharf or from barges alongside.

(g) That in alleging a willingness and readiness to accept delivery of the lumber on a barge or barges, and in thereby assuming to substitute such barge or barges for the schooner "W. H. Marston" without defendant's consent, plaintiffs would deprive the loading mill of the benefit of the certificate called for, under and by which such loading mill would be relieved from responsibility for impairment of the lumber's condition, or otherwise, occurring in its export.

(h) It appears that the presence of the schooner "W. H. Marston" alongside the wharf of the Knappton Mill & Lumber [9] Co. on the Columbia River, so that delivery could be made at the schooner's tackles, either from said wharf or from barges alongside, at defendant's option, was a condition precedent to any delivery by defendant, and the complaint does not show a compliance with said condition precedent.

(i) It is shown that the understanding of both parties to the contract was that the lumber was for immediate export after delivery, and that the delivery itself was intended to be of such character as to constitute one of the initial steps in the lumber's export, and, therefore, the allegation of plaintiff's readiness and willingness to accept delivery on a barge or barges shows an attempted violation of a material condition of the contract.

(j) It does not show that the schooner "W. H. Marston" was alongside the wharf of the Knappton Mill & Lumber Co. on the Columbia River on November 25th, 1917, or at any other time.

(k) It does not show where plaintiffs were ready to accept delivery of said lumber on November 25th, 1917.

III.

That said complaint is ambiguous and unintelligible for each and all of the reasons for which it is herein alleged and shown to be uncertain.

WHEREFORE, defendant prays that said complaint be dismissed and that it may have its costs herein.

Dated January 22d, 1918.

McCLANAHAN & DERBY,
Attorneys for Defendant.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law, and that it is not [10] interposed for purposes of delay.

McCLANAHAN & DERBY,
Attorneys for Defendant.

Receipt of a copy of the within Demurrer to Complaint is hereby admitted this 22d day of January, 1918.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiffs.

[Endorsed]: Filed January 22d, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[11]

At a stated term, to wit, the July term, A. D. 1918, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 21st day of October, in the year of our Lord one thousand nine hundred and eighteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,127.

W. LESLIE COMYN et al.

vs.

DOUGLAS FIR EXPLOITATION & EXPORT
CO.

(Order Overruling Demurrer.)

Defendants' demurrer to complaint, heretofore submitted, being now fully considered and the Court having rendered its oral opinion, it is ordered that said demurrer be and the same is hereby overruled.
[12]

(Title of Court and Cause.)

Answer to Complaint.

Now comes the defendant in the above-entitled cause and answering the complaint herein admits, denies and alleges as follows, to wit:

I.

Answering the allegations contained in paragraph I of said complaint, defendant admits the same.

II.

Defendant admits the allegations contained in paragraph II of said complaint.

III.

Answering the allegations of paragraph III, defendant admits that on November 2d, 1916, it wrote to plaintiffs the letter, a copy of which is set forth in said paragraph; it admits that plaintiffs endorsed on a copy of said letter their written approval and

that they delivered said copy with such endorsed approval to defendant. But in this connection defendant alleges that plaintiffs' said written approval of said letter was delivered to defendant enclosed in a letter from plaintiffs, dated November 6th, 1916, and not before.

IV.

Answering the allegations of paragraph IV of said complaint, defendant denies that on December 15th, 1916, it notified plaintiffs that it would deliver the 1,300,040 feet of "Fir" specified in said contract as a cargo for the "W. H. Marston" at the mill wharf of the Knappton Mills and Lumber Company at Knappton, Washington; it admits that the mill wharf of the Knappton Mills and [13] Lumber Company is situated on the Columbia River; it admits that on the 15th day of December, 1916, it sent to plaintiffs the instrument set forth in said paragraph IV, entitled "Acknowledgment of Order," and in this connection defendant alleges that said "Acknowledgment of Order" was sent to plaintiffs, enclosed in a letter dated December 15th, 1916, informing plaintiffs that the cargo for the Schooner "W. H. Marston" had been placed with the Knappton Mills and Lumber Company, at Knappton, Washington, and requesting them to sign the acceptance copy of the order and return same for defendant's files. It admits that thereupon plaintiffs signed their acceptance of said order and forthwith forwarded same to defendant.

V.

Answering the allegations of paragraph V of said

complaint, defendant admits that the figures and letter "1300 M" mean, and were at all times intended and understood by both plaintiffs and defendant to mean, 1,300,000 feet.

Defendant denies that the phrase "f. a. s. mill wharf" means free alongside mill wharf; it denies that the phrase "f. o. b. mill wharf," as used in the instrument set forth in said paragraph IV, means free on board mill wharf; it denies that said last two phrases were understood by the parties at said or any time to mean as alleged in said complaint. In this connection defendant alleges that the phrase "f. a. s." is a commercial term, known and commonly used in commercial transactions requiring shipments by water, and means free alongside ship, and that such was the understood meaning of said phrase by both plaintiffs and defendant, in its use in the instrument set forth in paragraph III of said complaint. Furthermore defendant alleges that the use of the phrase "f. a. s. Mill Wharves," in the instrument referred to in said paragraph III, was understood by both plaintiffs and defendant to require the actual presence, at a mill wharf, to be designated by defendant, of a [14] sailing vessel to receive at her tackles, delivery of the cargo of fir agreed to be sold. Furthermore defendant alleges, that in contracts for the sale of cargoes of lumber to be delivered "f.a.s. mill wharf," at a specified time, a custom of the trade requires the actual presence at the designated mill wharf of a vessel to take delivery at her tackles at such specified time, of the cargo of lumber, and that such custom was known to both plaintiffs and

defendant at the time the contract sued on herein was entered into, and was a general custom among buyers and sellers and shippers of lumber, in cargo lots, in the City and County of San Francisco, State of California, and generally in the Pacific Coast ports of the United States.

Further answering the allegations of said paragraph V, defendant admits that the phrase "on barges a. s. t. mill wharf" means, and at all times was understood by plaintiffs and defendant to mean, on barges at ship's tackles mill wharf.

Defendant denies that the phrase "G" List means, or was understood by both plaintiffs and defendant to mean, a certain schedule of lumber prices published by the Pacific Lumber Inspection Bureau, Inc., for the purpose of furnishing a basis for the quotation of prices; it admits that Exhibit "A" attached to said complaint is a copy of said "G" List, and in this connection and also as a separate answer and defense to this action, defendant alleges as follows:

That said "G" List is a standard schedule solely of prices of Douglas Fir lumber, bargained for or sold to be exported only, and that said "G" List furnishes the basis for the quotation of prices for Douglas Fir for export shipment only, to be delivered only to vessels at lumber mills within reach of such vessel's tackles, and defendant alleges that at all times mentioned, in said complaint, said "G" List was so known and understood by both plaintiffs and defendant. [15]

Defendant further alleges that among the terms

and conditions of said "G" List which were understood and accepted by both plaintiffs and defendant as forming a part of the contract sued on herein, is one providing that the prices in said "G" List are based on delivery of the Fir by the seller to sailing vessels, and defendant alleges that the prices in the contract sued on were based solely on delivery of a cargo of fir to the sailing vessel "W. H. Marston," and that this was at all times the understanding and agreement of both plaintiffs and defendant.

Defendant further alleges that another term and condition of said "G" List which was understood and accepted by both plaintiffs and defendant as forming a part of the contract sued on herein, provides and requires that there shall be furnished by the loading mill, on completion of the loading of the fir on the vessel, a certificate of said Pacific Lumber Inspection Bureau, Inc., made and sworn to by a regularly approved inspector licensed by said Bureau, and countersigned by one of the supervisors of said Bureau, certifying, after survey and inspection, to the quantity, character and condition of the shipment, which said certificate was to be accepted as proof of the character and condition of the fir at the port of shipment and was to relieve the loading mill from any responsibility for impairment of condition or otherwise occurring in transit.

Defendant further alleges that said certificate can only be issued after the fir, bargained for and sold, has been actually loaded on a vessel bound for a foreign port, and when issued must contain the name of the exporting vessel as well as the name of the

foreign port to which she is bound with said fir, and that this was known and understood by both plaintiffs and defendant at all times mentioned in said complaint. [16]

Defendant further alleges that said certificate could not be made or issued for fir loaded on a barge or barges, not intended for a voyage to a foreign port, and that this also was known and understood by both plaintiffs and defendant at all times mentioned in said complaint.

Defendant further alleges that another term and condition of said "G" List provides that during the loading of the fir bargained for and sold the supervisor and inspector of the Pacific Lumber Inspection Bureau, Inc., issuing the certificate herein referred to, are required to consider and determine whether the fir so being loaded on the vessel is in such seasoned condition as will work to the dry standards in its size in accordance with the official chart for worked sizes, included in said "G" List, and that this term and condition of said "G" List was understood and accepted by both plaintiffs and defendant as forming a part of the contract sued on herein.

Defendant further alleges that all of said terms and conditions of said "G" list were understood and accepted by both plaintiffs and defendant as forming a part of the contract sued on herein and were terms and conditions which were intended to be and which in fact were for the mutual benefit and protection of both plaintiffs and defendant, and were terms and conditions which neither party to said

contract could waive without the consent of the other.

VI.

Answering the allegations of paragraph VI of said complaint, defendant denies that on October 23, 1917, or at any time, plaintiffs notified defendant that on November 25th, 1917, they would take delivery of 1,300,000 feet of "fir" in accordance with terms of said contract at the wharf specified by defendant; [17] defendant admits that on October 23d, 1917, plaintiffs informed defendant in writing that on November 25th, 1917, they would have barges alongside the mill dock at Knappton, ready to take delivery of 1,300,000 feet of fir.

VII.

Answering the allegations of paragraph VII of said complaint, defendant denies that on November 25th, 1917, or at any other time, plaintiffs were ready, willing or able to take delivery of said lumber according to the terms of said contract, or at all, at the place specified by defendant, and denies that said plaintiffs were prepared to take delivery thereof, at said time or at any time, and denies that plaintiffs had barges or stevedores present on said day, or on any other day, at said or any other place to so take delivery, and denies that plaintiffs on said day, or at all, had performed or have ever since performed all or any of the conditions required of plaintiffs by said contract prior to and for the delivery of said lumber to plaintiffs. In this connection and as a separate answer and defense to the action, defendant alleges that on November 24th, 1917, a

launch towed a barge with a carrying capacity of not exceeding 400,000 feet of lumber to a certain boom in the Columbia River about 75 feet from the mill dock of the Knappton Mills and Lumber Company, and there moored and left said barge; that thereafter and on the morning of November 26th, 1917, a man claiming to be a representative of a certain stevedoring company of the City of Portland, Oregon, arrived at the mill of the said Knappton Mills and Lumber Company, at Knappton, Washington, and handed to a representative of said company, a letter in words and figures following:

“San Francisco, Nov. 6, 1917.

Knappton Mills & Lumber Company,

Agents Douglas Fir Exploitation & Export Co.,

Knappton, Washington. [18]

Dear Sirs:

Please deliver the undersigned mentioned lumber, in good order and condition, to Mr. Henry Rothschild or bearer.

1,300,000' of Douglas Fir purchased from you under contract dated November 2d, 1916, and in accordance with specifications handed you in San Francisco under date September 19th, 1917.

Very truly yours,

COMYN, MACKALL & CO.,

Per J. CLAUDE DALY.

D/W.”

Defendant further alleges as a separate answer and defense to this action, that neither said plaintiffs or anyone representing them at any time brought to or had said, or any barge or barges, at

the mill dock of the Knappton Mills and Lumber Company at Knappton, Washington; that at no time did said plaintiffs or anyone representing them have at said boom in said Columbia River, or at any place adjacent to the mill wharf of said Knappton Mills and Lumber Company, Washington, any barges other than the one herein referred to as having been moored to and left at said boom on said November 24th, 1917, and defendant attaches hereto, marked Exhibit "A," a copy of the specifications referred to in the letter last herein quoted, together with a copy of the letter written by plaintiffs accompanying said specifications, with copy of the bill of lading referred to in said letter and accompanying the same, and asks that the same may be considered as part of its answer and separate defense herein. And defendant alleges in this connection that it was never understood or agreed by plaintiffs or defendant at the time said contract was entered into, or at any other time, that a barge or barges might, at the option of plaintiffs, be furnished and used by plaintiffs in taking delivery of said fir intended for and sold as a cargo to the said schooner "W. H. Marston," but, on the contrary, it was the understanding and agreement of the parties and so expressed in said contract, that the option was given to defendant to make delivery of said cargo at the tackles of the said "W. H. Marston" from either the mill [19] wharf or from barges alongside, or from both said mill wharf and barges, and that this privilege and provision

of the contract was inserted wholly for the benefit of defendant.

And defendant further alleges in this connection that it was and would at all times have been impossible for it to make delivery of a cargo of fir to suit the capacity of the schooner "W. H. Marston," to a barge or barges, unless the capacity of said schooner was known, and defendant alleges that the capacity of said "W. H. Marston" was not known, and could not have been known or ascertained until said fir, in the lengths, breadths and sizes corresponding to the specifications furnished and required by plaintiffs, had been actually loaded on board said schooner "W. H. Marston," and in this connection defendant alleges that by its said contract with plaintiffs it did not obligate itself to do the impossible.

VIII.

Answering the allegations of paragraph VIII of said complaint, except as hereinafter explained and modified, defendant denies that it failed or refused to deliver 1,300,000 feet of "fir" in whole or in part, at said wharf to plaintiffs on said day, or on any other day as alleged; it denies that it notified plaintiffs that it would not deliver 1,300,000 feet of "fir" or any part thereof to plaintiffs at said wharf; it denies that ever since said 25th of November, 1917, it has failed or refused to deliver to plaintiff 1,300,000 feet of fir or any part thereof free on board said wharf or on barges free alongside said wharf. In this connection defendant alleges that it was at all times ready, willing and able to carry out the terms

of the contract for the sale and delivery of the fir set out and bargained for in said contract, and that it in fact did in accordance with said contract, deliver, to the schooner "W. H. Talbot," at her tackles, at a designated mill wharf, the full cargo of "fir" called for in said contract; [20] that in accordance with said contract it delivered to the schooner "Golden Shore," at her tackles, at a designated mill wharf (she being one of the vessels which, as required by said contract, plaintiffs subsequently named), the full cargo of "fir" called for in said contract; that although plaintiffs named, as required by said contract, the schooner "Wm. Borden" as the fourth vessel, the cargo of "fir" contracted for for that vessel was not delivered by defendant at her tackles, or at all, because of the failure of plaintiffs to have the said "Wm. Borden" at the agreed loading berth at the agreed date, and defendant alleges that the contract in so far as it applied to both the schooners "W. H. Talbot" and "Golden Shore" was fulfilled in strict accord with its terms, while that portion of said contract which applied to the schooners "W. H. Marston" and "Wm. Borden" was cancelled by defendant for the same reason, namely, the failure of plaintiffs to have either of said last-named vessels at the designated loading place within the agreed and specified loading time.

Defendant as a further separate answer and defense to this action alleges that the said schooner "W. H. Marston" was never at the mill wharf of the Knappton Mills and Lumber Company, at said

Knappton, Washington, at any time within the period extending from the 1st day of October to the 31st day of December, 1917, inclusive, and as a consequence it was never within the power of defendant and/or the said Knappton Mills and Lumber Company to deliver to said vessel a cargo of "fir" on the mill wharf of said company, free alongside said vessel, or free on board said mill wharf within reach of said vessel's tackles, or on barges at said vessel's tackles at said mill wharf.

IX.

Answering the allegations of paragraph IX of said complaint, [21] defendant not having information or belief sufficient to enable it to answer, it denies on that ground that plaintiffs expended the sum of \$304.00, or any other sum, in preparing to take delivery of 1,300,000 feet of fir, as set forth in said complaint, or at all, and calls for strict proof of said allegation.

X.

Answering the allegations of paragraph X of said complaint, defendant not having information or belief sufficient to enable it to answer, denies on that ground that plaintiffs on December 7th, 1917, or at any other time, purchased 1,300,000 feet, or any other number of feet of fir, at the price of \$22.50 net base "G" List to be delivered f. a. s. mill wharf on the Columbia River; or that said purchase price was, at the time of said purchase a reasonable price for said fir, or was at said time the prevailing market price in San Francisco of "fir" for delivery f. a. s. or f. o. b. mill wharf and/or on barges, a. s. t.

mill wharf at the loading ports of Puget Sound, Columbia or Willamette Rivers, Grays Harbor or Willapa, or that it was also at said time the prevailing market price of fir at said loading ports, and defendant calls for strict proof of said allegations.

XI.

Answering the allegations of paragraph XI of said complaint, defendant not having information and belief sufficient to enable it to answer, denies on that ground that the difference between the contract price of said fir and the price finally paid by plaintiffs is the sum of \$17,511.00, or any sum approximating the same; and defendant denies that by the failure of it to deliver said lumber to plaintiffs, they have been damaged in the sum of \$17,815.00 or any other sum, and defendant calls for strict proof of the allegations of said paragraph. [22]

And for a further and separate answer to said complaint, stated as a whole, and for five (5) further and separate answers to said complaint stated separately in Articles I, II, III, IV, and V following, defendant alleges as follows:

I.

That defendant is a corporation organized under the laws of the State of Washington, for the primary object and purpose of exploiting and increasing foreign trade in, and the use and consumption of Douglas Fir and other Pacific Coast forest products, in the foreign countries of the world only; that no person other than one actually

engaged in the manufacture of lumber on the Pacific Coast is eligible to subscribe for or become at any time a stockholder in same; that the entire stock of said defendant corporation is now and has been at all times since its organization owned or controlled by corporations and individuals owning or controlling a very large percentage of all the Douglas Fir lumber manufactured or produced on the Pacific Coast of the United States; that the Knapp-ton Mills and Lumber Company are, and were at all times mentioned in plaintiffs' complaint, stockholders in defendant corporation; that said defendant corporation was organized on October 11th, 1916, and commenced doing an export business in "fir" on November 1st, 1916, in anticipation of the passage by Congress of the United States of what was and is now known as the "Webb-Pomerene Bill," being the Act of April 10, 1918 (Compiled Statutes, U. S., secs. 8836 $\frac{1}{4}$ a to e, inclusive), permitting the organization of corporations or associations for the sole purpose of engaging in export trade, and being an amendment of what is popularly known as the "Sherman Act" (Act of July 2, 1890, Compiled Statute, U. S., secs. 8820 to 8836, inclusive); that the anticipated early passage of the said "Webb-Pomerene Bill" was postponed and said bill did not finally become law until April 10, [23] 1918; that between the date of November 1st, 1916, and the passage of said "Webb-Pomerene Bill," defendant did business as an exporter only of Douglas Fir with the tacit consent of the Federal Trade Commission (a commission created by act of Con-

gress of September 26th, 1914, Compiled Statute, U. S., secs. 8836a to 8836r, inclusive), which commission on the passage of said "Webb-Pomerene Bill" was given by that law, jurisdiction and supervision over the business and affairs of corporations or associations organized to do an expert business under that law; that all defendant's transactions and all the export business done by it after its organization, and up to the passage of said "Webb-Pomerene Bill" were regularly and duly reported to said Federal Trade Commission, and said commission was kept fully informed at all times of defendant's corporate acts, and especially its sales of Douglas Fir for exportation to foreign countries; that all of the Douglas Fir sold or handled by defendant is, and at all times since its incorporation has been purchased by it from its own stockholders, and under its charter, and also under the laws of the United States, it has no right or power to sell or in any way deal with Douglas Fir except for its export, and that plaintiffs knew and were fully cognizant of the organization of defendant corporation and its primary object and purpose, and were fully cognizant of all the matters and things herein alleged concerning defendant's corporate powers and restrictions, and were especially cognizant of defendant's method of doing business prior to the passage of said "Webb-Pomerene Bill," and were at all times since defendant's incorporation fully cognizant of defendant's inability to sell or deal in any way with Douglas Fir for any purpose except its exportation to foreign countries; that when

the contract sued on [24] herein was entered into, plaintiffs and defendant both knew that defendant could not, because of its charter restrictions and under the law, sell fir to the plaintiffs, or to anyone else, except for export, and it was with full knowledge and understanding of this liability of defendant that the contract sued on herein, specified and required the naming of the exporting vessels which it was agreed and understood said fir should be exported on; that at the time the contract sued on was entered into, plaintiffs knew that it was beyond the legal power of defendant to make delivery of said four cargoes of fir, or any fir, except to exporting vessels, or except in such manner as would assure said fir exportation, and that it was beyond the legal power of defendant to make delivery of fir in any way that would place it within the discretionary power of the plaintiffs to export it; that plaintiffs knew and it was understood by both parties, plaintiffs and defendant, at the time said contract was entered into, that the terms and conditions embodied in said contract touching the question of the exportation of said fir, were each and all of them intended to be safeguards and guarantees that said fir would pass into plaintiffs' possession in such manner as to make it imperative that the same should be exported, and that plaintiffs should be denied the right or power of dealing with said fir in any other way. And defendant alleges in this connection that even though it were possible to make a delivery to a barge or barges of the fir bargained for under the contract between plaintiffs

and defendant, such a delivery to a barge or barges, would place it within the power and legal right of plaintiffs to do with said fir as they might see fit, including the legal right and power of so disposing of said fir thereafter, in such manner as to make defendant's sale a violation of its charter, and of the laws of the United States. [25]

II.

That in the contract sued on herein the term thereof designating a particular known vessel at whose tackles a cargo of fir was to be furnished and delivered was inserted for the benefit of both plaintiffs and defendant and was a requirement of said contract which neither party thereto could waive without the consent of the other; and in this connection defendant alleges that at the time said contract was initiated and approved by plaintiffs, to wit, on November 6th, 1916, plaintiffs requested of defendant a modification of the same so as to give to plaintiffs the discretionary right of substituting another vessel for the schooner "W. H. Marston," which requested modification was refused by defendant. That said requested modification was made in a letter addressed by plaintiffs to defendant, enclosing plaintiff's approval of the instrument referred to in paragraph III of the complaint, and the refusal to so modify said instrument was expressed in a letter addressed by defendant to plaintiffs, both of which letters were in the words and figures as follows:

“San Francisco, November Sixth, 1916.

Douglas Fir Exploitation & Export Co.,
260 California Street,
San Francisco, California.

Dear Sirs: We have to acknowledge receipt of your sale note covering 3500 M' 15% more or less October to December, 1917. We now take pleasure in approving same as per enclosed. It is understood that the vessels named in your sale note are not to load above the bridges on the Columbia River, and with regard to the balance of the purchase, it is understood that same cannot, under any circumstances, be shipped from the Portland Lumber Company. We have also very great prejudice against shipping from the Inman, Poulsen, Clark & Wilson, and Peninsula Mills, and would much appreciate your not stemming us with those mills. We presume also that you would have no objection if it was found convenient, to our substituting other vessels in place of the 'Marston' or the 'Talbot.'

Very truly yours,
COMYN, MACKALL & CO.,
Per J. CLAUDE DALY.

CLD/W.” [26]

“San Francisco, California, November 8th, 1916.
Messrs. Comyn, Mackall & Co.,
310 California St.,
San Francisco, California.

Gentlemen: We acknowledge yours of the 6th and confirm your understanding that none of these vessels will be required to load above the bridges at Portland which, in truth, would exclude the Port-

land Lumber Company, but we will also agree that none of them are to load at the mill at Portland.

The other mills mentioned by you—Inman, Poulsen, Clark & Wilson, and Peninsula Lumber Company—are not interested in our Company, but if they should later come into the Company, Inman, Poulsen would still be excluded on account of being above the bridges. This then would leave only Clark & Wilson and the Peninsula Mills as possibilities, and we would prefer to keep them in that position, as it might be very necessary for us to load one of your vessels at one of these mills.

As regards substituting other vessels for 'Mars-ton' and the 'Talbot': as these vessels are now matters of record in the contract, we would prefer not to have any agreement giving you the option of naming other vessels. If, however, you have now or will have at any future time other vessels in like position and for your convenience wish to substitute them for either one or both of these vessels, we will be pleased to go into the matter with you with a view of meeting your necessities.

Very truly yours,

DOUGLAS FIR EXPLOITATION & EX-
PORT CO.

By A. A. BAXTER,
General Manager.

AAB/D."

Defendant also alleges that upon and after receipt by plaintiffs of the letter from the defendant last above quoted, plaintiffs then and at all times thereafter acquiesced in the refusal of defendant

to so modify said instrument of November 2, 1916; and it was with full knowledge and understanding on the part of plaintiffs that there could be no substitution of another vessel for the schooner "W. H. Marston" without defendant's consent, that plaintiffs thereafter signed their approval and acceptance of the instrument dated December 8th, 1916, set forth in paragraph IV of the complaint and entitled "Acknowledgment of Order," and by which the contract of defendant to furnish and deliver a cargo of fir to the schooner "W. H. Marston," was finally consummated. [27]

III.

That at all times after the final consummation of the contract sued on plaintiffs recognized and understood that it was incumbent upon them, as an obligation under said contract, to have the schooner "W. H. Marston" at the designated mill wharf of the Knappton Mills and Lumber Company, to take delivery at said vessel's tackles of a cargo of fir, until by their own act, and without the consent of defendant, plaintiffs made it impossible for said "W. H. Marston" to make the loading date at said mill wharf agreed to in said contract; and in this connection defendant alleges that plaintiffs were the charterers of the schooner "W. H. Marston," which vessel under her charter was bound, after discharging a lumber cargo in Australia, to proceed direct in ballast to a loading port on the Columbia River, at which latter port she was to load the cargo of fir contracted for in the contract sued on herein, and after being so

loaded with said cargo of fir, was to proceed to the port of Melbourne, Australia; that before said vessel had started on her voyage in ballast from Australia to said Columbia River, her owner desired from plaintiffs, as charterers of the vessel, permission for said vessel to carry, for account of said owner, a cargo of copra on the voyage from Australia to this Coast, instead of said vessel making said voyage in ballast, and for such permission offered to pay to plaintiffs the sum of \$5,000; that knowing it to be impossible for said "W. H. Marston" to load, carry and discharge said new cargo and also make her loading date under the contract in suit, plaintiffs offered defendant the sum of \$2,500.00 if it would agree to extend said "W. H. Marston's" said loading date so as to enable said vessel to carry said new cargo without forfeiting plaintiffs' right to the cargo of fir under the contract with the defendant; that said offer defendant refused and thereafter and despite defendant's refusal to extend said "W. H. Marston's" loading date, plaintiffs accepted [28] said owner's offer of \$5,000.00, received said sum from said owner and thereupon said "W. H. Marston" loaded, carried and delivered said new cargo, instead of returning to this coast direct in ballast, and thereby missed her loading date under the contract with defendant; that it was after said plaintiffs had accepted said offer of said schooner's owner, for the first time contended by plaintiffs that the said "W. H. Marston" was not required at said loading place at said agreed time, but that plaintiffs could

instead of said vessel substitute barges, and on such barges could accept delivery of said fir at said loading time and place.

And defendant alleges that the attempted substitution of a barge for the schooner "W. H. Marston" to take delivery of said schooner's cargo of fir, and plaintiffs' present construction of their contract with defendant, under which construction plaintiffs claim the right to take delivery of said schooner's cargo of fir on barges, is not made in good faith.

IV.

That at the time the contract sued on herein was entered into, it was known and understood by both plaintiffs and defendant, that in and by the use in said contract of a specified number of feet of fir, as the amount that each of the four vessels named, or to be named, should carry, it was intended and only intended, to approximate the number of feet of fir actually sold as the vessel's cargo, the actual amount of such vessel's cargo and the actual number of feet sold, was to be ascertained by the actual loading of the vessel, and being the full carrying capacity of said vessel, limited, however, to a margin of 15%, more or less, of the given approximation; that at said time it was known and understood by both parties that said contract covered a sale of a cargo for the schooner "W. H. Marston," such cargo being estimated to be 1,300,000 feet, but that in loading her if said schooner's capacity [29] was found to be more than said estimate, then the sale was to be for 1,300,000 feet plus such ascertained excess; that if said schooner's capacity in

loading her was found to be less than said estimate, then the sale was to be for such less number of feet, both contingencies being limited to a margin of 15% ;

That the letters "B. M." used in the instrument set forth in paragraph IV of plaintiffs' said complaint means and at all times mentioned in said complaint were intended by plaintiffs and defendant to mean board measure; that the phrase found in said instrument set forth in said paragraph IV reading: "1,300,000 feet B. M. 15% more or less to suit capacity of vessel," means and at all times mentioned in said complaint was intended by plaintiffs and defendant to mean a full cargo as herein above set forth and alleged in this paragraph of defendant's separate answer, and such phrase fixed and was intended by both parties to fix and determine the number of feet sold under said contract, as said vessel's cargo; that only through the actual receipt by and loading of said schooner "W. H. Marston" of said fir, would it be possible to know and determine the number of feet of fir sold under said contract for such vessel's cargo; that in the case of the schooner "W. H. Talbot" (one of the four vessels for which a cargo was agreed to be sold under said contract), while her approximated capacity was fixed in said contract at 1,000,000 feet, her actual cargo was not and could not have been known until said "W. H. Talbot" had actually been loaded, and when actually loaded, the number of feet so loaded was found to be 971,974 feet, and such number of feet fixed and determined the

amount of fir sold to plaintiffs under said contract as the cargo of that vessel; and plaintiffs paid defendant the agreed contract price for said 971,974 feet and for no more; that it would have been impossible to ascertain the amount of fir sold for delivery to the schooner "W. H. Marston" as that vessel's cargo under the said contract, had a barge or barges been furnished as the receiving [30] medium for said fir, instead of said "W. H. Marston," and this fact was known to both plaintiffs and defendant at the times said contract was entered into, and at all times thereafter mentioned in plaintiff's complaint.

V.

That in contracts for the sale of cargoes of lumber to named carrying vessels where a definite number of feet is used in the contract in connection with the phrase "15% more or less to suit capacity of vessel," it is a custom of the trade to load the named vessel to her capacity before determining the amount of lumber actually sold under the contract, and the agreed contract price of the lumber thereafter applies only to the number of feet so determined by actual loading, and even as to such is limited to 15% more or less than the definite number of feet named in the contract; that this custom was at all times mentioned in said complaint well known to both plaintiffs and defendant and was a general custom among buyers and sellers and shippers of lumber cargoes, in the City and County of San Francisco, State of California, and generally in the Pacific Coast ports of the United States.

WHEREFORE defendant prays that said complaint be dismissed and that judgment be entered in favor of defendant for its costs of suit herein and for such other and further relief as may be proper in the premises.

Dated: November 8th, 1918.

McCLANAHAN & DERBY,
Attorneys for Defendant. [31]

State of California,
City and County of San Francisco,—ss.

A. A. Baxter, being first duly sworn, deposes and says: That he is an officer of the defendant corporation, to wit, the general manager thereof, and as such is duly authorized to verify the foregoing answer, that he has read the foregoing answer, and knows the contents thereof, and that the same are true to his own knowledge except as to the matters therein stated on information and belief, and as to such matters he believes them to be true; that he makes this verification for and on behalf of the Douglas Fir Exploitation & Export Company, and defendant herein.

A. A. BAXTER.

Subscribed and sworn to before me this 8th day of November, 1918.

[Seal] JAMES MASON,
Notary Public in and for the City and County of
San Francisco, State of California.

Exhibit "A."

San Francisco,
September nineteenth,
Nineteen - seventeen.

Messrs. Douglas Fir Exploitation & Export Com-
pany,
260 California Street,
City.

Dear Sirs:

"W. H. Marston."

Enclosed we beg to hand you specifications for
this vessel, which we trust you will find in order.

[32]

You will note that the vessel is to be despatched
to Melbourne, and we will require the following
documents:

BILLS OF LADING—Two originals and three
non-negotiable copies covering each mark as
per *pro forma* herewith.

SPECIFICATION—Five (5) copies covering each
mark.

LUMBER BUREAU INSPECTION CERTIFI-
CATE—Four (4) copies.

MARINE UNDERWRITER'S SURVEYOR'S
CERTIFICATE—Four (4) copies.

MASTER'S DEMURRAGE RELEASE—Four
(4) copies.

STOWAGE PLAN—Four (4) copies.

YOUR INVOICE—In duplicate.

Very truly yours,

COMYN, MACKALL & CO.,
Per J. CLAUDE DALY.

CLD/W. [33]

SPECIFICATIONS OF OREGON MERCHANT-
ABLE.

NO MARK

To be shipped to MELBOURNE per S/V

"W. H. Marston."

October/December, 1917.

12x 6	807,500'	(450,000 16/32';	200,000 33/40')	
12x 6½	10,000'	(5,000 16/32';	5,000 33/40')	
12x10	200,000'	(100,000 16/32';	100,000 33/40')	
14x 6	10,000'	(7,500 16/32';	2,500 33/40')	
16x 6	10,000'	(7,500 16/32';	2,500 33/40')	
12x12	10,000'	(5,000 61/70';	5,000 71/80')	
16x16	16,000'	(8,000 51/60';	8,000 61/70')	
18x18	16,000'	(8,000 51/60';	8,000 61/70')	
20x20	5,000'	(5,000 71/80';		
24x24	10,000'	(10,000 16/32';		
16x14	5,000'	(2,500 16/32';	2,500 33/40')	1099,500'
	<hr/>			
	1099,500			

SELECT.

15x 5	25,000'	
18x 4	25,000'	
13x 6½	25,000'	
12x 6	25,000'	100,000'
	<hr/>	
	100,000'	

LATHS.

250,000 pcs. 4'x6"x1½" 3-out. 42,500

PICKETS.

50,000 pcs. 4' 6"x3x1.	58,000	100,500'
	<hr/>	
Total Quantity		1,300,000'
		Super [34]

COMYN, MACKALL & CO.

San Francisco.

Exporters of Lumber,

Shipping and Commission Merchants.

Marks	Pieces	Feet
UNDER DECK		
N/M	— Rhg. Merch. Dg. Fir. Lbr.	
	— Rhg. Select Oregon	
	— Bundles of Laths	
	— Dgl. Fir Pickets	
	On Deck	
	Totals	
	@ 126/3	
5% of cargo	63/7 1/2 [35]	

SHIPPED, in good order and condition, by COMYN, MACKALL & CO., on board the —, called the “Marston,” whereof — is Master, now lying at the port of Knappton, Wash., and bound for Melbourne—Australia, to say:

UNDER DECK.

- pieces Rough Merchantable Douglas Fir said to contain (....) feet Board Measure.
- pieces Rough Select Oregon said to contain (....) feet Board Measure.
- (....) Bundles of laths each containing ninety pieces.
- (....) pieces equalling (....) feet Board Measure.
- (....) Bundles Douglas Fir Pickets each containing ten pieces totalling (....) pieces equalling (....) feet Board Measure

ON DECK

being marked and numbered as per margin (all on board to be delivered) and are to be delivered in like good order and condition at the aforesaid port of Melbourne—Australia (the Act of God, perils of the sea, fire, barratry of the Master and crew, enemies, pirates, assailing thieves, arrest and restraint of princes, rulers and people, collision, stranding and other accidents, of navigation excepted even when occasioned by the negligence, default or error of judgment of the pilot, master, mariners, or other servants of the shipowners) unto order or to its assigns, he or they paying freight for said goods at the rate of as per charter-party dated April 11th, 1916, and amendment thereto, with average as per York-Antwerp Rules, 1890, and other conditions and exceptions as per charter-party.

IN WITNESS WHEREOF, the Master of said Ship or Vessel hath affirmed to two Bills of Lading; all of this tenor and date, one of which Bills being accomplished, the others to stand void.

Dated in ——— this—— day of ———, 191——.

—————, Master. [36]

Receipt of a copy of the within Answer is hereby admitted this 8th day of November, 1918.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiffs.

[Endorsed]: Filed November 8, 1918. Walter B. Maling, Clerk. [37]

(Title of Court and Cause.)

Demurrer to Answer.

Comes now the plaintiffs in the above-entitled action and demur to the defendant's answer herein, and for grounds of demurrer thereto specify:

I.

Plaintiffs demur to defendant's purported separate answer and defense contained in paragraph VII of said answer, beginning at line 27 on page 6 and ending at line 17 on page 7 of said answer, upon the ground that said purported separate answer does not state facts sufficient to constitute an answer to the cause of action stated in plaintiffs' complaint.

II.

Upon the same ground plaintiffs demur to defendant's purported separate answer and defense contained in paragraph VII of said answer, beginning at line 18 on page 7 and ending at line 27 on page 8 of said answer.

III.

Upon the same ground plaintiffs demur to defendant's purported separate answer and defense contained in paragraph VIII of said answer, beginning at line 30 on page 9 and ending at line 10 on page 10 of said answer.

IV.

Upon the same ground plaintiffs demur to the five purported further and separate answers to said complaint contained on pages 11, 12, 13, 14, 15, 16, 17, 18 and 19 of said answer. [38]

WHEREFORE, plaintiffs pray that said answer be dismissed and that plaintiffs have judgment as prayed for in their complaint.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiffs.

Received copy of within demurrer to answer this
27th day of November, 1918.

McCLANAHAN & DERBY,
Attorneys for Defendants.

[Endorsed]: Filed November 29, 1918. W. B.
Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[39]

(Title of Court and Cause.)

Notice of Motion to Strike Out Portions of Answer.

To the Defendant in the Above-entitled Action, and
to Messrs. McClanahan & Derby, Attorneys for
Said Defendant:

PLEASE TAKE NOTICE that the plaintiffs in the above-entitled action will, on Monday, the 9th day of December, 1918, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, move the honorable, the above-named court, at its courtroom in the United States Postoffice Building at *Sixth* and Mission Streets, in the City and County of San Francisco, State of California, for an order striking from the said defendant's answer in said action the following portions thereof, to wit:

I.

In paragraph III of said answer, beginning at line 29 on page 1 and ending at line 2 on page 2

thereof, to wit: "But in this connection defendant alleges that plaintiffs' said written approval of said letter was delivered to defendant enclosed in a letter from plaintiffs, dated November 6th, 1916, and not before."

II.

In paragraph IV of said answer, beginning at line 4 and ending at line 9 on page 2 thereof, to wit: "Answering the allegations of paragraph IV of said complaint, defendant denies that on December 15th, 1916, it notified plaintiffs that it would deliver the 1,300,000 feet of 'fir' [40] specified in said contract as a cargo for the 'W. H. Marston' at the mill wharf of the Knappton Mills and Lumber Company at Knappton, Washington."

III.

In paragraph V of said answer, beginning at line 1 and ending at line 12 on page 3 thereof, to wit: "In this connection defendant alleges that the phrase 'f. a. s.' is a commercial term, known and commonly used in commercial transactions requiring shipments by water, and means free alongside ship, and that such was the understood meaning of said phrase by both plaintiffs and defendant, in its use in the instrument set forth in paragraph III of said complaint. Furthermore defendant alleges, that the use of the phrase 'f. a. s. Mill Wharves,' in the instrument referred to in said paragraph III, was understood by both plaintiffs and defendant to require the actual presence, at a mill wharf, to be designated by defendant, of a sailing vessel to re-

ceive at her tackles, delivery of the cargo of fir agreed to be sold.”

IV.

In paragraph V of said answer, beginning at line 12 and ending at line 22 on page 3 thereof, to wit: “Furthermore defendant alleges, that in contracts for the sale of cargoes of lumber to be delivered ‘f. a. s. mill wharf,’ at a specified time, a custom of the trade requires the actual presence at the designated mill wharf of a vessel to take delivery at her tackles at such specified time, of the cargo of lumber, and that such custom was known to both plaintiffs and defendant at the time the contract sued on herein was entered into, and was a general custom among buyers and sellers and shippers of lumber, in cargo lots, in the City and County of San Francisco, State of California, and generally in the Pacific Coast ports of the United States.” [41]

V.

In paragraph V of said answer, beginning at line 5 and ending at line 12 on page 4 thereof, to wit: “That said ‘G’ List is a standard schedule solely of prices of Douglas Fir lumber, bargained for or sold to be exported only, and that said ‘G’ List furnishes the basis for the quotation of prices for Douglas Fir for export shipment only, to be delivered only to vessels at lumber mills within reach of such vessel’s tackles, and defendant alleges that at all times mentioned, in said complaint, said ‘G’ List was so known and understood by both plaintiffs and defendant.”

VI.

In paragraph V of said answer, beginning at line 13 and ending at line 21 on page 4 thereof, to wit: "Defendant further alleges that among the terms and conditions of said 'G' List which were understood and accepted by both plaintiffs and defendant as forming a part of the contract sued on herein, is one providing that the prices in said 'G' List are based on delivery of the fir by the seller to sailing vessels, and defendant alleges that the prices in the contract sued on were based solely on delivery of a cargo of fir to the sailing vessel 'W. H. Marston,' and that this was at all times the understanding and agreement of both plaintiffs and defendant."

VII.

In paragraph VIII of said answer, beginning at line 10 and ending at line 29 on page 9 thereof, to wit: "And that it in fact did, in accordance with said contract, deliver to the schooner 'W. H. Talbot,' at her tackles, at a designated mill wharf, the full cargo of 'fir' called for in said contract; that in accordance with said contract it delivered to the schooner 'Golden Shore,' at her tackles, at a designated mill wharf (she being one of the vessels which, as required [42] by said contract, plaintiffs subsequently named), the full cargo of 'fir' called for in said contract; that although plaintiffs named, as required by said contract, the schooner 'Wm. Borden' as the fourth vessel, the cargo of 'fir' contracted for for that vessel was not delivered by defendant at her tackles, or at all, because of the failure of plaintiffs to have the said 'Wm. Borden' at the

agreed loading berth at the agreed date, and defendant alleges that the contract in so far as it applied to both the schooners 'W. H. Talbot' and 'Golden Shore' was fulfilled in strict accord with its terms, while that portion of said contract which applied to the schooners 'W. H. Marston' and 'Wm. Borden' was cancelled by defendant for the same reason, namely, the failure of plaintiffs to have either of said last named vessels at the designated loading place within the agreed and specified loading time."

VIII.

All of paragraph I of said answer, beginning at line 18 on page 11 and ending at line 8 on page 14 thereof.

IX.

In paragraph I of said answer, beginning at line 18 on page 11 and ending at line 26 on page 12 thereof, to wit: "That defendant is a corporation organized under the laws of the State of Washington, for the primary object and purpose of exploiting and increasing foreign trade in, and the use and consumption of Douglas Fir and other Pacific Coast forest products, in the foreign countries of the world only; that no person other than one actually engaged in the manufacture of lumber on the Pacific Coast is eligible to subscribe for or become at any time a stockholder in same; that the entire stock of said defendant corporation is now and has [43] been at all times since its organization owned or controlled by corporations and individuals owning or controlling a very large

percentage of all the Douglas Fir lumber manufactured or produced on the Pacific Coast of the United States; that the Knappton Mills and Lumber Company are, and were at all times mentioned in plaintiffs' complaint, stockholders in defendant corporation; that said defendant corporation was organized on October 11th, 1916, and commenced doing an export business in 'fir' on November 1st, 1916, in anticipation of the passage by the Congress of the United States of what was and is now known as the 'Webb-Pomerene Bill,' being the Act of April 10, 1918 (Compiled Statutes, U. S., secs. 8836 $\frac{1}{4}$ a to e inclusive), permitting the organization of corporations or associations for the sole purpose of engaging in export trade, and being an amendment of what is popularly known as the 'Sherman Act' (Act of July 2, 1890, Compiled Statutes, U. S., secs. 8820 to 8836, inclusive); that the anticipated early passage of the said 'Webb-Pomerene Bill' was postponed and said bill did not finally become law until April 10, 1918; that between the date of November 1st, 1916, and the passage of said 'Webb-Pomerene Bill,' defendant did business as an exporter only of Douglas Fir with the tacit consent of the Federal Trade Commission (a commission created by act of Congress of September 26th, 1914, Compiled Statutes, U. S., secs. 8836a to 8836r, inclusive), which commission on the passage of said 'Webb-Pomerene Bill' was given by that law jurisdiction and supervision over the business and affairs of corporations or associations organized to do an export business under that law; that all defendant's

transactions and all the export business done by it after its organization, and up to the passage of said 'Webb-Pomerene Bill,' were regularly and duly reported to said Federal Trade [44] Commission, and said commission was kept fully informed at all times of defendant's corporate acts, and especially its sales of Douglas Fir for exportation to foreign countries."

X.

All of paragraph II of said answer, beginning at line 10 on page 14 and ending at line 5 on page 16 thereof.

XI.

All of paragraph III of said answer, beginning at line 7 on page 16 and ending at line 22 on page 17 thereof.

XII.

All of paragraph IV of said answer, beginning at line 24 on page 17 and ending at line 13 on page 19 thereof.

XIII.

All of paragraph V of said answer, beginning at line 15 and ending at line 29 on page 19 thereof.

Said motion will be made upon the ground that each and every of the said portions of said answer sought to be stricken out is and are irrelevant, incompetent and immaterial, and that the purported facts therein stated constitute no defense to the cause of action stated in plaintiffs' complaint in said action.

Dated: November 27th, 1918.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiffs.

Received copy of within notice of motion to strike out portions of answer this 27th day of November, 1918.

McCLANAHAN & DERBY,
Attorneys for Defendants.

[Endorsed]: Filed November 29th, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[45]

At a stated term, to wit, the July term, A. D. 1919, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 14th day of July, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge:

No. 16,127.

W. LESLIE COMYN et al.

vs.

DOUGLAS FIR EXPLOITATION & EXPORT
CO.

**Order Denying Motion to Strike Out Parts of
Answer, etc.**

Plaintiff's motion to strike out parts of answer and demurrer to answer, heretofore heard and submitted, being fully considered and the Court having rendered its oral opinion, it is ordered that said

motion be and the same is hereby denied, and that said demurrer be and the same is hereby sustained as to the portion of the answer beginning at paragraph 1 on page 11, and that said demurrer be overruled as to remaining portion of the answer. [46]

At a stated term, to wit, the November term, A. D. 1920, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Friday, the 31st day of December, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 16,127.

W. LESLIE COMYN et al.

vs.

DOUGLAS FIR EXPLOITATION & EXPORT
CO.

**(Order Directing Opinion to be Filed and That
Judgment be Entered.)**

Ordered that the opinion of the Honorable Robert S. Bean, District Judge, and the findings of fact and conclusions of law signed by Judge Bean, herein, be filed and that judgment be entered in favor of plaintiff in accordance therewith. [47]

In the Southern Division of the District Court of
the United States for the Northern District of
California, Second Division.

No. 16,127.

W. LESLIE COMYN and BENJAMIN F. MAC-
KALL, Copartners Doing Business Under
the Firm Name of COMYN, MACKALL &
COMPANY,

Plaintiffs,

vs.

DOUGLAS FIR EXPLOITATION & EXPORT
COMPANY, a Corporation,

Defendant.

Findings of Fact and Conclusions of Law.

This case was tried without the intervention of a jury and the Court having heard the evidence and argument of counsel, makes the following findings of fact in addition to the admissions in the pleadings, and conclusion of law:

1.

That prior to October 17, 1916, the plaintiff had contracted to purchase from Charles Nelson & Co., manufacturers of lumber, and the Nelson Company to sell to it 3,500,000 feet, ten per cent more or less Oregon (fir), shipment or loading July to December, 1917. No receiving vessel was named in the contract, but a memorandum thereof was enclosed in a letter of date October 17, from the plaintiff to Nelson Company, saying that "it is probable that

we will load under this contract the 'W. H. Marston,' October, November, December, and the 'W. H. Talbot' for same loading; on the balance of the contract we may put in two of our own vessels estimated 1,450,000 capacity, October, November, December." Thereafter and on November 1, 1916, defendant corporation, composed of various manufacturers of fir lumber in Oregon and Washington, including the Charles Nelson Company, commenced doing business and took over the sales of lumber of the member concerns for export, and its letter [48] to plaintiff of date November 2, 1916, as set out in Article III of the complaint, was confirmatory of and by reason of the previous contract between the Nelson Company and plaintiff.

2.

In the lumber trade the letters f. a. s., f. o. b. and a. s. t., as used in the contracts between the plaintiff and defendant as set out in the pleadings mean, respectively, "free alongside; within reach of ship's tackles," "free on board" and "at ship's tackles," and were so understood by both parties at the time of the making of such contracts.

3.

That plaintiff's written approval of defendant's letter of November 2, 1916, as set forth in Article III of the complaint was not sent or delivered to defendant on that date, but enclosed in letter from plaintiff to defendant of date November 6, 1916, in which plaintiff stated, "we presume also that you would have no objection if it was found convenient to us, to substituting other vessels in place of the

‘Marston’ and the ‘Talbot,’ ” to which letter defendant replied under date of November 8, 1916, as follows: “As regards substituting other vessels for the ‘Marston’ and ‘Talbot,’ as these vessels are now matters of record in the contract we would prefer not to have any agreement giving you the option of naming other vessels. If, however, you have now or will have at any future time other vessels in like position and for your convenience wish to substitute them for either one or both of these vessels, we will be pleased to go into the matter with you with a view of meeting your necessities.” And such was the situation at the time the contract set out in Article IV of the complaint (or acknowledgment of order) was executed and delivered. [49]

4.

That the vessel “Marston” referred to in the agreements set out in the pleadings was never at the mill wharf of the Knappton Mills & Lumber Company at any time within the period from October 1st to December 31st, 1917, inclusive, and was never tendered to defendant to carry the lumber referred to, and her presence at the loading place was not waived by defendant.

5.

That on September 19, 1917, plaintiff furnished to defendant specifications for the lumber to be cut by it for the “Marston,” and defendant in acknowledging receipt thereof, stated that as the vessel’s position at that time was such that “she would have very little chance of discharging her cargo and returning to the Columbia River in time to commence

loading during December," it would hold the specifications for the present at least.

6.

On September 27, 1917, plaintiff notified defendant that it would take delivery of the lumber f. a. s. mill wharf Knappton and/or barges a. s. t. mill wharf Knappton in the month of December, but under date of October 1st defendant declined to consent to the change requested since "order was sold for shipment by the 'W. H. Marston.' "

7.

That on October 10, 1917, plaintiff again notified defendant that it would take delivery of the 1,300,000 feet B. M. of lumber ("15% more or less at your option if desired") beginning December 3, 1917, at the rate of 60,000 feet per working day. That "if this date is inconvenient for you we will commence to take delivery later in December. We [50] *giving* you the option of making delivery in any manner prescribed in the contract to wit, f. a. s. mill wharf Knappton, and/or on barges a. s. t. mill wharf at Knappton and request to be advised of the date when you will commence delivery and which option you elect." The defendant refused to make delivery as requested or at all.

8.

That on October 23, 1917, plaintiff notified defendant that it would have barges alongside the mill wharf on November 25th, ready to take delivery, and on the date named in such notice plaintiff did have a barge at the dock ready to take delivery. Defendant refused to make such delivery and on

January 2, 1918, notified plaintiff that as the "Marston" had not arrived and the time had expired by limitation it had canceled the contract.

9.

That during the month of December, 1917, the prevailing market price of lumber at the place of delivery was \$22.50 per thousand net base G list, being a difference on the quantity of lumber specified in the contract between the market price and the contract price of \$17,511.00.

10.

That plaintiff expended the sum of \$304.00 in preparing to take delivery as hereinbefore set forth.

11.

That there was no material or competent evidence offered or given on the trial showing any custom which is sufficient to vary in any way the written agreement or contract between the parties as alleged in the pleadings. [51]

As conclusions of law the Court finds:

First: That the failure of the plaintiff to have the "Marston" alongside the mill wharf ready to take delivery of the lumber within the delivery dates did not relieve the defendant from making delivery as demanded by plaintiff.

Second: That plaintiff is entitled to judgment against defendant for the sum of \$17,815.00, with interest from December 7th, and its costs and disbursements.

To each of the foregoing findings of fact and conclusions of law the defendant excepts, which exceptions are hereby allowed.

Dated this 28th day of December, 1920.

R. S. BEAN,
Judge.

[Endorsed]: Filed December 31, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[52]

(Title of Court and Cause.)

Judgment on Findings.

This cause having come on regularly for trial upon the 28th day of October, 1920, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation filed; Oscar Sutro and M. H. Farmer, Esqrs., appearing as attorneys for plaintiffs, and E. B. McClanahan and S. H. Derby, Esqrs., appearing as attorneys for defendant; and the trial having been proceeded with on the 29th and 30th days of October, 1920, and oral and documentary evidence upon behalf of the respective parties having been introduced and closed and the cause, after arguments by the attorneys, having been submitted to the Court for consideration; and the Court, after due deliberation, having filed its findings in writing and ordered that judgment be entered herein in accordance with said findings; and the plaintiffs having filed in writing their remission of the sum of \$304.00 from the amount allowed the plaintiffs in said findings:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that W. Leslie Comyn and Benjamin F.

Mackall, copartners doing business under the firm name of Comyn, Mackall & Co., plaintiffs, do have and recover of and from Douglas Fir Exploitation & Export Company, a corporation, defendant, the sum of seventeen thousand five hundred ninety-two and 72/100 (\$17,592.72) dollars, together with their costs herein expended taxed at \$135.50.

Judgment entered December 31, 1920.

WALTER B. MALING,
Clerk.

A true copy.

[Seal] Attest: WALTER B. MALING,
Clerk.

[Endorsed]: Filed Dec. 31, 1920. Walter B. Maling, Clerk. [53]

(Title of Court and Cause.)

Memorandum Opinion.

Memorandum by BEAN, District Judge:

As appears from the findings of fact herewith filed, the single question for decision is whether the failure of plaintiff to have the "Marston" at the mill wharf ready to receive cargo within the delivery dates specified in the contract relieved the defendant from the obligation to make delivery as demanded. In other words, whether the plaintiff could legally require delivery without furnishing the named vessel as the receiving medium. This question in substance was decided by Judge Van Fleet adversely to defendant on demurrer to the complaint. In his opinion I fully concur. The naming of the

vessel in the contract, in my judgment, was a stipulation for the benefit of plaintiff and could be waived by it. (Ellsworth vs. Knowles, 97 Pac. 690; Meyer vs. Sullivan, 181 Pac. 847; Harrison vs. Fortlage, 161 U. S. 64.) It does not affect the identity of the subject matter nor the time and place of delivery. The failure of plaintiff to furnish the named vessel did not add anything to the obligations of defendant. It was in no way important to it whether the buyer transferred the lumber to the "Marston" or to some other carrier, so long as it did not impose upon it any additional expense or undue delay. It would have fully discharged all the obligation on its part if it had cut and delivered the lumber on the wharf or on barge as demanded by plaintiff. The fact that the parties contemplated that the lumber would be loaded on the "Marston" did not make the "Marston" a necessary feature of the performance of the contract by defendant, or a condition precedent to defendant's obligation to make delivery. The provision f. o. b. mill wharf "within [54] reach of ship's tackles" or "on barges a. s. t. mill wharf" did not affect the seller's obligation to deliver on the mill wharf or on barges. The delivery would be complete and its obligations discharged as soon as the lumber was placed on the mill wharf or on barges at mill wharf and accepted by plaintiff. It was wholly immaterial whether plaintiff used the "Marston" or some other receiving medium for shipment of the lumber.

It is claimed that the contract was for a cargo

sale and that the capacity of the "Marston" was the measure of the quantity to be delivered, but the contract names the quantity, and the expression therein, "15% more or less to suit capacity of vessel," would simply allow the specified quantity to be varied to that extent, if the named vessel had been tendered as the receiving medium, but the failure to tender it would not relieve the defendant from making delivery if demanded of the specified quantity.

It is also said that the time and place of delivery was affected by the naming of the "Marston," but these matters are both fixed by the contract, and plaintiff offered to take delivery as therein specified.

Defendant's motions for nonsuit and directed verdict are therefore denied and overruled, and judgment will be entered for plaintiff as prayed for.

[Endorsed]: Filed Dec. 31, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [55]

(Title of Court and Cause.)

Petition for New Trial.

Now comes the defendant above named at the same term of Court at which the said action was tried, and within ten days after the entry of judgment herein moves to set aside the judgment heretofore entered herein and that a new trial of said cause be granted for the following causes, to wit:

1. Insufficiency of the evidence to justify the said decision;
2. That the said decision is against law;
3. Errors in law occurring at the trial;

Defendant now specifies the particular errors at law occurring at the trial:

1. The Court erred in refusing the offer of defendant to prove that the defendant commenced doing business on November 1, 1916, in anticipation of the passage by Congress of the Webb-Pomerene Bill, and that between November 1, 1916, and the passage of the said Webb-Pomerene Bill the defendant did business as an exporter, with the tacit consent of the Federal Trade Commission; to which ruling an exception was taken and allowed.

2. The Court erred in denying defendant's offer to prove the facts contained in each of the five separate defenses in the answer to the complaint, and embraced within paragraph I to paragraph V on page 11 to page 20 of said answer; to each of which rulings an exception was taken and allowed.

3. The Court erred in sustaining the objections of plaintiffs to the following questions asked by defendant of the witness W. Leslie Comyn, "When did you secure a buyer [56] for this cargo?" and "Was the contract with your buyers in Australia not made before October, 1917?" and "Was this lumber that was loaded onto the 'Marston' by Dant & Russell not used in the fulfillment of the contract which had been made prior to October, 1917?" and "Did you not suffer no loss in the fulfillment of that contract by the lumber loaded on

to the 'Marston' by Dant & Russell?" To each and every of which said rulings an exception was taken and allowed.

4. The Court erred in denying to the defendant the right to offer evidence in support of the following offer, viz., "to prove that plaintiffs' contract with their Australian buyers of the specification cargo to be furnished under the specification cargo contract in suit was carried out at a profit to the plaintiffs, and that such profit was the profit which the contract originally carried, although such contract with the Australian buyers was fulfilled by the 'W. H. Marston' with the cargo loaded under the Dant & Russell contract"; to which ruling an exception was made and allowed.

5. The Court erred in denying the motion of defendant for a nonsuit, which was made at the conclusion of plaintiffs' case in chief, and which said motion was renewed at the conclusion of the taking of all the testimony in the case; to which rulings specific objections were made and exceptions allowed.

6. The Court erred in denying the motion of defendant made after all the evidence in the case had been produced, to the effect that the Court find in favor of the defendant; to which ruling an exception was taken and allowed.

7. The Court erred in overruling the demurrer of defendant to the complaint.

8. The Court erred in sustaining the demurrer of plaintiffs [57] to each and every of the five

special defenses set out in the answer beginning at paragraph 1 on page 11 thereof.

9. The Court erred in finding as a conclusion of law that the failure of the plaintiffs to have the "Marston" alongside the mill wharf ready to take delivery of the lumber within the delivery dates specified did not relieve the defendant from making delivery as demanded by plaintiffs.

10. The Court erred in making each and every finding of fact or conclusion of law that plaintiffs are entitled to judgment against the defendant in any sum.

Defendant now specifies the particulars wherein the evidence is claimed to be insufficient to justify the decision, to wit:

1. There is no evidence that the failure of the plaintiffs to have the "Marston" alongside the mill wharf ready to take delivery of the lumber within the delivery dates did not relieve the defendant from making delivery as demanded by plaintiffs.

2. There is no evidence that plaintiffs are entitled to a judgment against the defendant for the sum of \$17,815, or in any sum.

3. There is no evidence to support the finding contained in paragraph numbered 9 of the findings of fact, to the effect that the plaintiffs are entitled to the sum of \$17,511 for the alleged breach of the contract in suit; it being apparent that under the contract at least fifteen per cent of that amount should be deducted.

4. There is no evidence to justify the Court in including in the amount awarded against defend-

ant the sum of \$304 expended by plaintiffs in preparing to take delivery, for the reason that the right to recover the said sum of \$304 was waived by the [58] plaintiffs.

This petition will be heard upon the pleadings and papers on file herein and upon the minutes of the Court and upon this petition.

Dated January 10, 1921.

McCLANAHAN & DERBY,
CHICKERING & GREGORY,
Attorneys for Defendant.

Service of the within petition for a new trial and receipt of a copy is hereby admitted this 10th day of January, 1921.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 10, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [59]

At a stated term, to wit, the March term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Saturday, the 16th day of April, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,127.

W. LESLIE COMYN et al.

vs.

DOUGLAS FIR EXPLOITATION & EXPORT
CO.

(Order Denying Defendant's Motion for New Trial.)

In accordance with the written directions of Judge Bean, it is ordered that the defendant's motion for a new trial be and the same is hereby denied. [60]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,127.

W. LESLIE COMYN and BENJAMIN F. MACKALL, Copartners Doing Business Under the Firm Name of COMYN, MACKALL & CO.,

Plaintiffs,

vs.

DOUGLAS FIR EXPLOITATION & EXPORT
COMPANY, a Corporation,

Defendant.

**Engrossed Bill of Exceptions for Use on Appeal from
Judgment.**

BE IT REMEMBERED that the above-entitled action came on regularly for trial on the 28th day

of October, 1920, before the Honorable Robert S. Bean, Judge of the above-entitled court, sitting without a jury, Oscar Sutro, Esq., Milton H. Farmer, Esq., and Messrs. Pillsbury, Madison & Sutro, appearing as attorneys for the above-named plaintiffs, and Messrs. McClanahan & Derby, appearing as attorneys for the above-named defendant.

After opening statements had been made by Mr. Sutro for the above-named plaintiffs, and by Mr. McClanahan for the above-named defendant, the following proceedings were had:

Testimony of W. Leslie Comyn, for Plaintiffs.

W. LESLIE COMYN was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows:

Direct Examination.

My name is William Leslie Comyn, and I am engaged in the [61—1] business of ship owner, manufacturer, lumber exporter and other businesses. Among other matters I am interested in lumber-mills on Puget Sound, but not on the Columbia River. What I have just said about my business was true in 1916.

Mr. SUTRO.—Q. Now, Mr. Comyn, I show you an instrument which is pleaded in the complaint, and ask you if you recognize that. A. I do.

Q. That is the sales memorandum, if we may so term it, dated November 2, 1916, signed “Douglas Fir Exploitation & Export Co., by A. A. Baxter, General Manager,” and addressed to Messrs.

(Testimony of W. Leslie Comyn.)

Comyn, Mackall & Co. I think I would like to read it to your Honor. As there are not many of these papers that I want to read, I think perhaps I had better read this. It is on the letter-head of the Douglas Fir Exploitation & Export Company, 260 California Street.

Plaintiffs' Exhibit No. 1.

“San Francisco, Cal., November 2, 1916.

Messrs. Comyn, Mackall & Co.,

310 California St.,

City.

Gentlemen:

Sold prior to October 11, 1916.

This will confirm sale to you of four cargoes Fir F. A. S. mill wharves as follows:

‘W. H. Marston’ 1300 M October to December 1917.

‘W. H. Talbot’ 1000 M “ “ “ 1917.

(Quotations subject to change without notice.

All agreements are contingent upon the acts of God, riots, strikes, lock-outs, fires, floods, accidents, inability to secure cars, transportation or other causes of delay beyond our control)

and two of your own vessels to be named later, with a combined capacity of 1450 M, both for loading October to December 1917, cargo to be furnished F. A. S. vessel at loading ports at 60 M daily in Puget Sound, Columbia or Willamette Rivers, Gray’s Harbor and Willapa at our option, but one loading port only for each vessel, loading port to be named by us in ample time to give vessel instruc-

(Testimony of W. Leslie Comyn.)

tions before leaving her next previous port of call.

Tally and inspection by Pacific Lumber Inspection Bureau at loading port. Certificate to be furnished and to be final. Price \$9.50 base 'G' list less $2\frac{1}{2}\%$, $2\frac{1}{2}\%$ cash. Marking if required, distinguishing mark at 10¢ per M extra cost.

Written in duplicate. Please approve and return one [62—2] copy.

Very truly yours,

DOUGLAS FIR EXPLOITATION & EXPORT CO.

By A. A. BAXTER,
General Manager."

Now, we will offer that as Plaintiff's Exhibit 1. (The letter was marked Plaintiff's Exhibit 1.)

WITNESS.—(Continuing.) I believe that that sales note was received by my company and approved and returned by us to the defendant.

Mr. SUTRO.—What is the meaning, as you understand it, of the language, "Sold prior to October 11, 1916"?

Mr. McCLANAHAN.—I object to that, if your Honor please, as immaterial, irrelevant and incompetent, this being a case upon this particular contract, and not upon any other.

The COURT.—I think the objection is not well taken. There is a statement in this contract, and it needs explanation. The Court cannot interpret it without knowing what it means, if it has any bearing on the issues at all.

(Testimony of W. Leslie Comyn.)

To which ruling the said defendant duly excepted, and now assigns the same as error.

EXCEPTION No. 1.

WITNESS.—(Continuing.) To begin with, this is an improper statement of fact. The cargo was purchased from the Charles Nelson Company on the 17th of October, and you have the contract, I believe, yourself, in your possession. This cargo, or these four cargoes had actually been purchased from the Charles Nelson Company on October 17, 1916.

Mr. McCLANAHAN.—Now, if your Honor please, I renew my motion and ask that the answer be stricken out.

The COURT.—The objection will be overruled, and you may take an exception. This trial is before the Court, and, therefore, I [63—3] feel that I am entitled to all the facts surrounding the case, if I have to interpret this contract.

To which ruling the said defendant duly excepted, and now assigns the same as error.

EXCEPTION No. 2.

WITNESS.—(Continuing.) These four cargoes of lumber were sold October 17, 1916. The fact is, however, that the sale was made by contract with the Charles Nelson Company October 17, 1916. The memorandum dated October 17, 1916, which you show me, is the contract with the Charles Nelson Company, to which I have just referred. That is a copy of the letter which accompanied that contract. The document denominated Exhibit No. 1,

(Testimony of W. Leslie Comyn.)

dated November 2, 1916, was prepared by the defendant and sent to us.

Thereupon Mr. Sutro read and offered in evidence a copy of said memorandum, which was in words and figures as follows:

Plaintiffs' Exhibit No. 2.

“October Seventeenth, 1916.

Messrs. The Chas. Nelson Co.,

San Francisco, California.

Dear Sirs:

Confirming the writer's conversation with your Mr. Baxter to-day”—

—is that the same Mr. Baxter, Mr. Comyn, who signed this? A. Yes.

Q. The gentleman who is sitting there? A. Yes.

Mr. SUTRO.—(Continues reading:)

“Confirming the writers conversation with your Mr. Baxter today, we have purchased:

3500 M 10% more or less Oregon.

Shipment and/or Loading—July to December,
1917.

Price: \$10.00 per thousand base ‘G’ List less
2½ and 2½ f. a. s. mill.

Port of Loading—It is your option to load the above on Puget Sound, Columbia or Willamette Rivers or on Grays or Willapa Harbor, always provided of course that we have the right of loading at these places in Charter Party.

This contract is in duplicate, one of which we have signed, and shall be pleased if you will com-

(Testimony of W. Leslie Comyn.)

plete and return the [64—4] other at your convenience.

Very truly yours,
COMYN, MACKALL & CO.,
Per _____.”

WITNESS.—(Continuing.) That was signed by Mr. C. L. Daly.

Thereupon Mr. Sutro read and offered in evidence a letter in words and figures as follows:

“October Seventeenth, 1916.

Messrs. The Chas. Nelson Co.,

San Francisco, California.

Dear Sirs:

Referring to the contract enclosed covering purchase of 3500 M of Oregon it is probable that we will load under this contract the ‘W. H. Marston’ October/November/December and the ‘W. H. Talbot’ for the same loading. On both of these vessels we have the option of loading on Puget Sound or Columbia or Willamette Rivers. On the balance of the contract we may put in two (2) of our own vessels, estimated about 1450 M capacity, October/November/December, which can load at any of the several ports mentioned in the contract.

Very truly yours,
COMYN, MACKALL & CO.,
Per _____.”

WITNESS.—(Continuing.) C. L. Daly signed that letter too.

Mr. SUTRO.—We offer these two as Exhibit 2.

(Testimony of W. Leslie Comyn.)

Mr. McCLANAHAN.—I object to the offer on the ground that they are immaterial, irrelevant and incompetent. The contract sued on here is with a different company, and for a different kind of lumber; this calls for Oregon, ours called for Douglas Fir, and I cannot see, for the life of me, the relationship. I have never seen this contract before, it is not covered by the pleadings, and is not in issue, this contract. Will counsel state his purpose in offering it?

Mr. SUTRO.—The purpose is to explain the phrase “Sold prior to October 11, 1916,” put into Mr. Baxter’s memorandum to [65—5] Mr. Comyn, and which we expect to explain still further when Mr. Baxter gets on the stand.

The COURT.—This memorandum or note, or this communication of November 2d, says, “This will confirm sale to you of four cargoes.”

Mr. SUTRO.—Yes, and we expect to show there were some negotiations prior to that time; I suggest that it be admitted subject to the objection, and Mr. McClanahan will be entitled to an exception to the ruling.

Mr. McCLANAHAN.—Yes.

Mr. SUTRO.—The price in your contract with The Chas. Nelson Co. was set at \$10 per thousand, and the price in the sale note of November 2, 1916, was \$9.50 a thousand. I understand from you that the contract expressed on November 2, 1916, was the sale intended to be covered by the corre-

(Testimony of W. Leslie Comyn.)

spondence that I have just read, Exhibit 2? Will you explain, please, the different price?

A. When the Douglas Fir Exploitation & Export Co., which is a monopoly, was formed, it endeavored to take over all of the lumber they could that was sold before a certain date, and they took this in under their arrangement, although it was sold after that date, and their price for that lumber was \$9.50, and they took these cargoes over, and they had to put them in at \$9.50, if they were going to put them into the Douglas Fir Exploitation & Export Company at all.

Q. What date did the Douglas Fir Exploitation & Export Company commence to actively function, operate, do you remember?

WITNESS.—(Continuing.) I don't remember the exact date upon which the Douglas Fir Exploitation & Export Company commenced actively to operate, it was about October 11, 1916. At that time they took over from various exporters the contracts which they had with various mills. This is one of the contracts that the [66—6] Douglas Fir Exploitation & Export Company took over from Charles H. Nelson. The mills of the Charles H. Nelson Company went into the Douglas Fir Exploitation & Export combination, so that on November 2, 1916, the Charles H. Nelson Company had made this contract with me and had gone into the combination. The only action which we took then with reference to the contract which we had with the Charles Nelson [67—6a] Company so far as

(Testimony of W. Leslie Comyn.)

transferring it to the Douglas Fir Exploitation & Export Co. is what is in the record, that is, we permitted the Douglas Fir Exploitation & Export Co. to take the contract over. At that time the price which the Douglas Fir fixed for lumber of this kind was \$9.50 a thousand, then they promptly put it to \$10.00. Our contract with the Nelson Company, according to our correspondence, was \$10.00 a thousand. If we had got the cargo we would have got it for \$9.50, but we never did get it. In other words, in the contract that we made with the Douglas Fir the price was changed to \$9.50. The cargo of lumber, or the four cargoes of lumber that we were buying under their sales note of November 2, 1916, were intended to be the four cargoes that we had contracted for with the Charles Nelson Company, but not necessarily at the same loading ports. We had the same choice as to loading ports. At the time we made this contract with the Charles Nelson Company we had not specified any of the four ships. We said we would probably load certain vessels.

Mr. McCLANAHAN.—I understand this is all subject to my objection.

The COURT.—All subject to your objection.

“F. a. s.” means free alongside. It means free alongside the mill wharf or free alongside anything you choose to put in. If you put a barge there it would be free alongside of the barge. If you put a sailing vessel there, it would be free alongside the vessel, of a steamer, free alongside the steamer. In the phrase “f. a. s.” the letter “s”

(Testimony of W. Leslie Comyn.)

stands for "side." It certainly does not stand for "ship." It is a very well-known term in the trade.

The COURT.—Q. And you say it means "free alongside" mill wharf?

A. Free alongside; it means free alongside at the face of the [68—7] wharf. The lumber is not delivered to you in the mill.

WITNESS.—(Continuing.) When the note contains "'W. H. Marston' 1,350,000 feet October to December, 1917, 'W. H. Talbot' 1,000,000 feet October to December, 1917," it means that the lumber was to be delivered and taken by us between the months named, and when it contains "and two of your own vessels to be named later" it means that we would probably put in two vessels that we owned at a later date. On November 2, 1916, at the time when this contract was made, I did not myself know what two ships would take the balance of this lumber, neither did the Douglas Fir know. I couldn't say offhand what ships we actually later selected to carry these cargoes. I could refresh my memory and tell you. Upon your refreshing my memory I recall that the "Golden Shore" was one of them, and the "Borden" was another. None of these ships had been named at the time that this contract was made, and we did not have them in contemplation. So far as I know, the Douglas Fir did not know anything about them. This contract was signed without two of our ships being known, even to ourselves, because we did not own either of those ships as a matter of fact. We had in contemplation putting in two of

(Testimony of W. Leslie Comyn.)

our own with a combined capacity of 1,450,000 feet. The 1,300,000 feet which we intended to carry by the "Marston" and the 1,000,000 feet which we intended to carry by the "Talbot" and the 1,450,000 feet which we intended to carry by the other two, would approximately make the quantity that we had contracted for.

When the contract says "Cargo to be f. a. s. vessel" the "f. a. s. vessel" means free alongside vessel. It does not mean "free alongside ship vessel." The letter "s" there does not mean "ship." Suppose it was a steamer, you would not say "f. a. s." meant alongside the steamer. When it says "Tally and inspection by Pacific Lumber Inspection Bureau at loading port" it means [69—8] these cargoes are all tallied by the Pacific Lumber Inspection Bureau, which is an independent concern. It is free of the mills and free of the buyers; it is an independent inspection bureau or board of surveyors. They tally and inspect any lumber that we jointly tell them to tally and inspect. The Pacific Lumber Inspection Bureau certificate is accepted by the mill, on the one hand, and the buyer, on the other, as being the correct statement of the condition and quantity of the lumber. That inspection is sometimes made for lumber that is loaded on to barges. I have known that to be done very often. There is no difficulty at all about inspecting lumber loaded on vessels. With regard to export lumber, the inspection is always made of lumber that is loaded on to a mill wharf. The inspection is never made after the lum-

(Testimony of W. Leslie Comyn.)

ber is put on to the vessel; it is always made before it goes, before it leaves the mill.

Under the custom of the trade, and under this contract, as I understand it, the seller's obligations ceased in respect to the delivery of the lumber when we took it from the mill wharf. The buyer puts it on the ship, and the seller's obligation is complete when he puts the lumber on the mill wharf. He must not leave it outside of the mill wharf, he has got to bring it to the face of the wharf so that you can get it and put it anywhere you want to. The buyer is responsible for the taking of the cargo off of the mill wharf. If a steamer is alongside the mill wharf, what I have just stated is absolutely true because you pay the steamer a certain rate which provides that she shall put her tackle over and put that stuff over on board. If you put a steamer alongside, the buyer takes the lumber off the wharf and puts it on the steamer. The seller has nothing to do with that operation. If you put a sailing vessel alongside the wharf, the fact is absolutely the same. With regard to putting the lumber on a sailing [70—9] vessel, when you charter a ship you pay that ship a certain rate for chartering. The buyer puts the lumber on the sailing vessel. All that the seller has to do with it is to deliver it on the face of the mill wharf so that the ship can get at it. He does not have to put it on the sailing vessel. If you put barges alongside the wharf, the buyer puts the lumber on the barges. The seller has nothing to do with that. The seller's obligations in respect

(Testimony of W. Leslie Comyn.)

to the delivery of the lumber are the same whether it be a steamer, a sailing vessel, or a barge, where he buys the stuff "f. a. s. mill wharf." By "Price \$9.50 base 'G' list less $2\frac{1}{2}\%$, $2\frac{1}{2}\%$ cash," it is meant that the price of the lumber is based on a certain rate, a certain specified base for various sizes; the "G" list provides certain different prices for different sizes. It is a base price. I think it is the Pacific Coast Lumber Association or the Pacific Coast Lumber Inspection Bureau who put it out, I don't know which. It might be the West Coast Lumbermen's Association, I would not swear to it. The mill people are responsible for getting it out. Very likely, it was the Douglas Fir that got it up. They do it now. They do a lot of things since they have got in. The "G" list furnishes the base price. The base price is varied according to the market. The market goes up and down and they vary the price. The last $2\frac{1}{2}\%$ is $2\frac{1}{2}\%$ commission, $2\frac{1}{2}\%$ discount for cash.

"Marking if required, distinguishing mark at 10¢ per M extra cost," means that if you require your lumber marked, they charge you that much more. It is a stipulation for our benefit, for the benefit of the buyer. This sales memorandum was followed by a letter dated December 15, 1916. We received that letter. It enclosed four orders such as that.

Mr. SUTRO.—It can be stipulated, I suppose, that the other one of the vessels to be named was the same as this? [71—10]

(Testimony of W. Leslie Comyn.)

Mr. McCLANAHAN.—In its general statement, yes.

Mr. SUTRO.—Essentially the same.

Q. Now, Mr. Comyn, as you have identified this letter, I show you three orders which have been produced by Mr. McClanahan, headed “W. H. Marston,” “W. H. Talbot,” and “Vessel to be named,” and ask you if those three orders were three of the orders accompanying this letter of December 15? A. They were.

Q. And then was there a fourth order, “Vessel to be named”? A. There was.

Q. Now, in respect to the “Marston,” the order which I am about to offer is set out on page 3 of the complaint. This is a letter which is not set out in the complaint, a letter headed,—

Plaintiffs' Exhibit No. 3.

“DOUGLAS FIR EXPLOITATION AND EXPORT CO.

December 15, 1916.

Comyn, Mackall & Co.

City.

Gentlemen:

We enclose herewith the following orders:

Order #39—Schr. ‘W. H. Talbot’: We have placed this with the Raymond Lumber Co. of Raymond, Wash.

Order #40; Vessel to be named—725M: We have placed this cargo with the Hanify Co. at Raymond, Wash.

Order #41; Vessel to be named—725M: We have placed this with the Kleebe Lumber Co., South Bend, Wash.

Order #38: Schr. 'W. H. Marston': We have placed this cargo with the Knappton Mills and Lumber Co. at Knappton, Wash.

Would ask you to sign the acceptance copy of these orders and return same for our files.

Thanking you for the business, we remain,

Yours very truly,

DOUGLAS FIR EXPLOITATION & EXPORT CO.

By D. C. THOMPSON." [72—11]

Said letter was thereupon admitted in evidence and marked Plaintiffs' Exhibit No. 3.

Mr. SUTRO.—Now, we would like to offer in evidence the order with the acceptance of Comyn, Mackall & Co., and ask that that be marked plaintiffs' Exhibit No. 4.

The COURT.—Is that the order for the "Marston"? Is that the one copied into the complaint?

Mr. SUTRO.—Yes.

Said letter was thereupon admitted in evidence and marked Plaintiffs' Exhibit No. 4, which was in words and figures as follows:

Plaintiffs' Exhibit No. 4.

ACKNOWLEDGMENT OF ORDER.

Douglas Fir Exploitation
& Export Co.
260 California St.,
San Francisco, Cal.

Our No. 38, page 1.
Date December 8, 1916.
Your Order No.—.
Dated —.

Knappton Mills & Lumber Company.
Sold to—Comyn, Mackall & Company.
For Account of—
To be delivered at Knappton, Wash.
For reshipment to—
Time of Shipment October to December, 1917.
Time of Delivery do

Mill tally and inspection to govern and to be final. Agreements are contingent upon the acts of God, strikes, lock-outs, fires, floods, accidents, inability to secure cars, transportation or other causes beyond our control. This is a confirmation of your order as we understand it. Please check each item with your original order and advise us promptly of any errors. Read carefully the special notes in our price list. Shipment will be made as per confirmation irrespective of original order unless advised to the contrary by you.

Pieces.	Feet.	Size.	Length.	Description.
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SCH. "W. H. MARSTON."

1,300,000 feet B. M. 15% more or less to suit capacity of vessel.

PRICE: \$9.50 Base "G" List, less 2½% & 2½% for cash.

DESTINATION: Australia. (Usual Australian Specifications.)

GRADE: As per "G" list, P. L. I. B. Certificate to be furnished.

DELIVERY: 60 M feet per working day or pay demurrage as provided by Charter Party.

MARKING: Marking if ordered, 10 cents per M, Net Cash. [73—12a]

SHIPMENT: October to December, 1917.

TERMS AND CONDITIONS: As per "G" list.

NOTES: This price is for delivery F. O. B. Mill Wharf, Knappton, within reach of vessel's tackles and/or on barges A. S. T. Mill Wharf, Knappton, Wash.

Accepted: COMYN, MACKALL & CO.

Per J. CLAUDE DALY.

Dec. 28, 1916.

Please return for our files.

DOUGLAS FIR EXPLOITATION & EXPORT CO.

Note

Refer to E. G.

O. K.—E. R. G.

Thereupon the order for the "W. H. Talbot," with the acceptance of Comyn, Mackall & Co., was

admitted in evidence and marked Plaintiffs' Exhibit No. 5, which was in words and figures as follows:

Plaintiffs' Exhibit No. 5

Douglas Fir Exploitation
& Export Co.
260 California St.
San Francisco, Cal.

Our No. 39, page 1.
Date December 8, 1916.
Your Order No. ——.
Dated ——.

Raymond Lumber Company.
Sold to—Comyn, Mackall & Company.
For Account of—
To be delivered at Raymond, Wash.
For reshipment to—
Time of Shipment October to December, 1917.
Time of Delivery do
Total cargo shipped 971
972

Mill tally and inspection to govern and to be final. Agreements are contingent upon the acts of God, strikes, lock-outs, fires, floods, accidents, inability to secure cars, transportation or other causes beyond our control. This is a confirmation of your order as we understand it. Please check each item with your original order and advise us promptly of any errors. Read carefully the special notes in our price list. Shipment will be made as per confirmation irrespective of original order unless advised to the contrary by you.

Pieces.	Feet.	Size.	Length.	Description.
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SCH. "W. H. TALBOT."

100,000 feet B. M. 15% more or less to suit capacity of vessel.

PRICE: \$9.50 Base "G" List, less 21½% & 21½% for cash.

DESTINATION: Australia. (Usual Australian Specifications.)

GRADE: As per "G" list, P. L. I. B. Certificate to be furnished.

DELIVERY: 60 M feet per working day or pay demurrage as provided by Charter Party. [74—12b]

MARKING: Marking if ordered, 10 cents per M, Net Cash.

SHIPMENT: October to December, 1917.

TERMS AND CONDITIONS: As per "G" list.

NOTES: This price is for delivery F. O. B. Mill Wharf, Raymond, Wash., within reach of vessel's tackles and/or on barges A. S. T. Mill Wharf, Raymond, Wash.

Accepted: COMYN, MACKALL & CO.

Per J. CLAUDE DALY.

Dec. 28, 1916.

Please return for our files:

DOUGLAS FIR EXPLOITATION & EXPORT CO.

Note

Refer to E. G.

O. K.—E. R. G.

Thereupon the order for "Vessel to be named," with the acceptance of Comyn, Mackall & Co., was

admitted in evidence and marked Plaintiffs' Exhibit No. 6, which was in words and figures as follows:

Plaintiffs' Exhibit No. 6.

ACKNOWLEDGMENT OF ORDER.

Douglas Fir Exploitation
& Export Co.
260 California St.
San Francisco, Cal.

Our No. 41, page 1.

Date December 8, 1916.

Your Order No. —.

Dated —.

Kleeb Lumber Company.

Sold to—Comyn, Mackall & Company.

For Account of—

To be delivered at South Bend, Wash.

For reshipment to—

Time of Shipment ~~October~~—July to December, 1917.

Time of Delivery do

Mill tally and inspection to govern and to be final. Agreements are contingent upon the acts of God, strikes, lock-outs, fires, floods, accidents, inability to secure cars, transportation or other causes beyond our control. This is a confirmation of your order as we understand it. Please check each item with your original order and advise us promptly of any errors. Read carefully the special notes in our price list. Shipment will be made as per confirmation irrespective of original order unless advised to the contrary by you.

vs. W. Leslie Comyn and Benjamin F. Mackall. 87

Pieces.	Feet.	Size.	Length.	Description.
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VESSEL TO BE NAMED.

725,000 feet B. M. 15% more or less to suit capacity
of vessel.

PRICE: \$9.50 Base "G" List, less 21½% & 21½%
for cash.

DESTINATION: Australia or West Coast. (Usual
Specifications.)

GRADE: As per "G" list, P. L. I. B. Certificate
to be furnished.

DELIVERY: 60 M feet per working day or pay de-
murrage as provided by Charter Party. [75—
12c]

MARKING: Marking if ordered, 10 cents per M,
Net Cash.

SHIPMENT: ~~October~~—July to December, 1917.

TERMS AND CONDITIONS: As per "G" list,
(Our letter A 425).

NOTES: This price is for delivery F. O. B. Mill
Wharf, South Bend, Wash., within reach of
vessel's tackles and/or on barges A. S. T. Mill
Wharf, South Bend, Wash.,

Accepted: COMYN, MACKALL & CO.

Per J. CLAUDE DALY.

Dec. 28, 1916.

Please return for our files:

DOUGLAS FIR EXPLOITATION & EX-
PORT CO.

Note

Refer to E. G.

O. K.—E. R. G.

It was thereupon stipulated that, subject to cor-
rection in its general statements, the fourth order

(Testimony of W. Leslie Comyn.)

was in all respects similar to Plaintiffs' Exhibit No. 6, "Vessel to be named."

Mr. SUTRO.—I want the record to show that 1,450,000 feet was sold at that time and the vessels not named."

WITNESS.—(Continuing.) At the time this letter was written, December 15, 1916, two of the vessels that were to carry this lumber had not been named. At that time they were not known to me. So far as I know, they were not known to the Douglas Fir. In the acknowledgment of order which has just been offered in evidence with respect to the cargo which we expected to lift by the "Marston," when the order says "Sold to Comyn, Mackall & Co. for account of, to be delivered at Knappton, Washington," it means delivered from mill wharf at Knappton, Washington. That is the Knappton, there is only one mill at Knappton. "Mill tally and inspection to govern and be final" means inspection to be made at the mill wharf before the lumber was taken from the wharf. There would be no difference at all in the inspection if the lumber [76—12d] was loaded on to a steamer or if it was loaded on to a sailing vessel. There would be no difference at all in the inspection if the lumber was loaded on to a barge and not on to a sailing vessel. When it says "1,300,000 feet B.M.," "B.M." means board measure.

"15 per cent more or less to suit capacity of the vessel," as I understand the custom of the trade that was a sale of 1,300,000 feet, 15 per cent more or less. "Destination, Australia. (Usual Australian speci-

(Testimony of W. Leslie Comyn.)

fications)"—there would not be a bit of difference in the specifications if the lumber was loaded on to a barge or on to a sailing vessel, the specifications would be just the same that you gave the mill to cut. We furnished the specifications, we were the buyers. In these contracts the buyer furnished the specifications and the mill cuts according to these specifications.

When the memorandum says, "This price is for delivery f. o. b. mill wharf," it means the price covers delivering that lumber on the mill wharf instead of back away inside the mill. In other words, the delivery was to be on the mill wharf. "f. o. b." means free on board the mill wharf. It differentiates between the mill wharf and the interior of the mill, and that price covered delivery on the mill wharf.

"Within reach of vessel's tackles" means that if you put a vessel alongside there the lumber must be so far up on the mill wharf that the vessel's tackles will reach it. With respect to the place of delivery, the point where the mill had to put the lumber, there would not be a particle of difference whether there was a vessel alongside the mill wharf or a barge. The mill would put the lumber on the same spot on the wharf, whether it was for delivery to a vessel or to a barge. In the expression "And/or on barges A. S. T. mill wharf," I should say "A. S. T." means alongside tackles. I don't know, I never heard of that expression before. [77—13] We never had it

(Testimony of W. Leslie Comyn.)

before in the lumber trade that I know of. I have *had* it referred to as at ship's tackle.

Q. "And/or on barges at ship's tackle mill wharf": What difference in the mode of delivery would there be to the mill if those barges were alongside a ship, or if they were not alongside a ship?

A. If they did that, they would have to load the stuff from the mill wharf on to barges, first, and then put them alongside the ship.

WITNESS.—(Continuing.) Assuming that this was an option in favor of the mill, whether they would deliver on wharf or on barges, and assuming that the mill delivered it to the barges, it would not make a bit of difference in the method of delivering to barges if the barges lay alongside the ship or did not lay alongside the ship; they would have nothing to do with loading that lumber on to the ship. In the case of delivery to barges, the obligation of the mill would cease, and it would have performed its part of the contract when it put the barges alongside the ship, and if there were no ship it would cease as soon as it was on the barges. It would cease as soon as the lumber was on the barges if they sold it on the barges. If the mill had an option to deliver to barges, and it exercised that option, the obligation of the mill would cease when the lumber was on the barges. After that time it would be the obligation of the buyer to take the lumber from the barges, they would have to load it from the barges on to the ship. As a matter of fact, the "Marston" was loaded with a cargo of lumber. These cargoes of lumber that

(Testimony of W. Leslie Comyn.)

were bought from the Douglas Fir Company were not loaded on to the "Marston." We never got this lumber.

Thereupon, a letter dated September 19, 1917, addressed to defendant by plaintiff and signed by Mr. C. L. Daly was admitted [78—14] in evidence, marked Plaintiff's Exhibit No. 7, and was in words and figures as follows:

Plaintiffs' Exhibit No. 7.

"September 19, 1917.

Messrs. Douglas Fir Exploitation & Export Company,

260 California St., City.

Dear Sirs:

'W. H. MARSTON.'

Enclosed we beg to hand you specifications for this vessel, which we trust you will find in order.

You will note that the vessel is to be dispatched to Melbourne, and we will require the following documents:

Bills of lading: Two originals and three non-negotiable copies covering each mark as per form herewith;

Specification: 5 copies covering each mark;

Lumber Bureau Inspection Certificate: 4 copies;

Marine Underwriters Surveyor's Certificate: 4 copies;

Master's Demurrage Release: 4 copies.

Stowage Plan: 4 copies.

Your Invoice: In duplicate.

Very truly yours,"

(Testimony of W. Leslie Comyn.)

WITNESS.—(Continuing.) The bills of lading, specifications, lumber bureau inspection certificate, Marine Underwriters surveyor's certificate, and master's demurrage release, were all of them asked for by us of the defendant. If we had not supplied a vessel there but had put barges there to take this lumber, we would not have required a bill of lading, we would have required specifications. We would have required the Lumber Bureau Inspection certificate. We would not have required the Marine Underwriters' surveyor's certificate. We would not have required the master's demurrage release nor a stowage plan. We would have required the defendant's invoice. In reply to that letter marked Plaintiff's Exhibit No. 7, we received a letter dated September 20th. [79—15]

Said letter was thereupon admitted in evidence and marked Plaintiff's Exhibit No. 8, and was in words and figures as follows.

Plaintiffs' Exhibit No. 8.

“Messrs. Comyn, Mackall & Co.,
310 California Street,
San Francisco.

Gentlemen:

‘W. H. MARSTON.’

We acknowledge your favor of September 19th, received this morning, with enclosures as stated, including specifications for the cargo.

This cargo, as you know, was sold for October–November–December, 1917 loading. The vessel's

(Testimony of W. Leslie Comyn.)

position to-day, as reported in The Guide is 96 days out from the Columbia River for Melbourne. Even should she arrive there to-day she would have very little chance of discharging her cargo and returning to the Columbia River in time to commence loading during December, and, as before intimated to you, under no conditions could we commence loading this vessel later than December, on the old contract, which provides for \$9.50 base 'G' list; therefore, we will hold the specifications in this office for the present, at least, and if you wish will meet with you at any time at your convenience to determine how this cargo is to be handled.

Very truly yours,

DOUGLAS FIR EXPLOITATION & EXPORT COMPANY,

By A. A. BAXTER,
General Manager."

WITNESS.—(Continuing.) To the best of my knowledge and belief the "Marston" was at that time bound for Melbourne. There was practically no chance at all for her getting back, unloading her cargo, and getting back to the Columbia River in time to make an October, November or December loading. In other words, in September, 1917, it was known, not only to the Douglas Fir Exploitation & Export Company, according to that letter, but also to us, that she could not get back in time. That is to say, that she could not get back by December, 1917. At that time the "Marston" was under sub-charter

(Testimony of W. Leslie Comyn.)

to us, and that sub-charter was in existence at the time that we made this contract for the lumber. At the time that this letter was written by the Douglas Fir Company we had not made any variations in that sub-charter. [80—16]

Thereupon Plaintiff's Exhibit No. 9 was admitted in evidence, and was in words and figures as follows:

Plaintiffs' Exhibit No. 9.

"September 21, 1917.

Messrs. Douglas Fir Exploitation & Export Company,

260 California Street,

San Francisco.

Dear Sirs:

We have to acknowledge receipt of yours 20th, A-3062, subject matter. 'W. H| Marston.'

We have no comment at the present moment to make on this matter, beyond the fact to correct your impression that the cargo is bought specifically for October, November, December. Our contract was originally for specified quantity for July to December, and the 'Marston' was one of the boats named to apply on same.

Faithfully yours,

COMYN, MACKALL & CO."

WITNESS.—(Continuing.) Probably that letter referred to the original loading dates in the contract Charles Nelson Company, which specified July to December.

Thereupon Plaintiff's Exhibit No. 10 was admitted in evidence, and was in words and figures as follows:

(Testimony of W. Leslie Comyn.)

Plaintiffs' Exhibit No. 10.

“September 27, 1917.

Douglas Fir Exploitation & Export Company,
Newhall Building,
San Francisco, Calif.

Gentlemen:

With further reference to 1,300,000 feet B. M. 15 per cent, more or less, to be furnished by Knappton Mills & Lumber Co. for October, November, December, 1917:

We will take delivery of this lumber f. a. s. mill wharf Knappton and/or on barges a. s. t. Mill Wharf Knappton, in the month of December. Please advise us promptly on what date in December you will make delivery.

Yours truly.”

WITNESS.—(Continuing.) In September, 1917, it was known, both to plaintiff and defendant that the “Marston” could not make its loading date, if the latest date was December 31, 1917. She [81—17] could not discharge her cargo and get back to the Columbia River in ballast in time to load in December, 1917. That would be without any variation from her original sub-charter. The defendant replied to that letter under date of October 1, 1917.

Thereupon Plaintiff's Exhibit No. 11 was admitted in evidence, and was in words and figures as follows:

(Testimony of W. Leslie Comyn.)

Plaintiffs' Exhibit No. 11.

“October 1, 1917.

Messrs. Comyn, Mackall & Co.,
310 California Street,
San Francisco.

Gentlemen:

Order No. 38:

Acknowledging and replying to your letter of the 27th ult. we beg to advise that this order was sold for shipment by the ‘W. H. Marston,’ loading October to December, 1917, and we cannot see our way clear to consent to the change you request, namely, to deliver this f. a. s. mill to a barge, as requested in yours of the 27th ult.

Very truly yours,

**DOUGLAS FIR EXPLOITATION & EX-
PORT CO.**

By A. A. BAXTER,
General Manager.”

WITNESS.—(Continuing.) Order No. 38 was the order number which this cargo had taken. After that letter the defendant always refused to deliver that lumber to us except to the “Marston” within the time of the contract.

Thereupon Plaintiff's Exhibit No. 12 was admitted in evidence, and was in words and figures as follows:

(Testimony of W. Leslie Comyn.)

Plaintiffs' Exhibit No. 12.

“October 10, 1917.

Douglas Fir Exploitation & Export Co.,
260 California Street,
San Francisco.

Dear Sirs:

We have your letter of October 2d.

If we correctly understand your letter, you decline to deliver this lumber to us. In order that there may be no uncertainty about the matter, we demand and notify you that we will take delivery of this 1,300,000 feet B. M. of lumber (15 per cent more or less at your option if you desire), beginning Monday, December 3, 1917, at the rate of 60 M feet per working day. If [82—18] this date is convenient for you we will commence to take deliveries at a later date in December. We give you the option of making the delivery in any manner provided by the contract, to wit, f. a. s. mill wharf, Knappton, and/or on barges a. s. t. mill wharf, Knappton. We request that you specify as soon as possible the day upon which you will commence delivery, and which option, as to manner of delivery you elect.

Very truly yours,
COMYN, MACKALL & CO.”

WITNESS.—(Continuing.) In that letter, when we say that we will take delivery of 1,300,000 feet, 15% more or less at our option, by “15 per cent more or less” we mean 15 per cent more than 1,300,000 or 15 per cent less than 1,300,000 at their option. They

(Testimony of W. Leslie Comyn.)

could give us whatever they liked, they could give us 1,300,000, they could give us 1,300,000 and 15 per cent more or they could give us 1,300,000 and 15 per cent less. We tried to be fair with them.

Thereupon Plaintiff's Exhibit No. 13 was admitted in evidence, and was in words and figures as follows:

Plaintiffs' Exhibit No. 13.

"October 12, 1917.

Messrs. Comyn, Mackall & Co.

310 California Street,

San Francisco.

Gentlemen:

Replying to your favor of the 10th instant, we beg to say that you are mistaken in your interpretation of our position in this matter. We do not decline to deliver to you the 1,300,000 feet mentioned in contract of November 2, 1916. On the contrary, we stand ready to carry out this contract in every particular, but we decline to change the same in the manner suggested by you, or in any other particular.

In yours of the 10th inst. you acknowledge ours of October 2d, which is a mistake, as we cannot find we wrote you on October 2d, on this subject. We think it should have acknowledged ours of October 1st. (No.-3116).

Very truly yours,

DOUGLAS FIR EXPLOITATION & EXPORT CO.

By A. A. BAXTER,
General Manager."

Thereupon Plaintiff's Exhibit No. 14 was admitted in evidence, and was in words and figures as follows: [83—19]

Plaintiffs' Exhibit No. 14.

“October 17, 1917.

Douglas Fir Exploitation & Export Co.,
260 California Street,
San Francisco.

Dear Sirs:

Replying to your letter of the 12th inst., your file A-3229:

We note with satisfaction that you stand ready to carry out our contract with you”—
it says “with you,” it should be “with us.”

“We note with satisfaction that you stand ready to carry out your contract with us of November 2, 1916, with respect to the delivery of 1,300,000 feet of lumber therein mentioned. We will be ready to accept delivery in December and ask that you designate the date when you will commence deliveries.

Yours truly,

COMYN, MACKALL & CO.”

Thereupon Plaintiff's Exhibit No. 15 was admitted in evidence, and was in words and figures as follows:

Plaintiffs' Exhibit No. 15.

October 19, 1917.

Messrs. Comyn, Mackall & Co.,
310 California Street,
San Francisco.

Gentlemen:

Re Sale of Lumber f. a. s.

‘W. H. MARSTON.’

In acknowledging and replying to your favor of the 17th instant, we desire to make our position clear to you with reference to the delivery of this lumber. Because of the expressed satisfaction in your communication, we infer that you would have us believe that you understand we have acquiesced to your request to make delivery of the lumber in question alongside a barge at mill wharf. If this is your understanding, you are in error, and in order that there may be no possible ground for further misunderstanding our position, we will briefly recapitulate the facts and circumstances of this transaction.

By letter of November 2, 1916, we agreed to sell you four cargoes of fir lumber for export, October to December deliveries, 1300 M feet f. a. s. ‘W. H. Marston;’ 1000 M feet f. a. s. ‘W. H. Talbot,’ and 1450 M feet (combined capacity) f. a. s. two of your own vessels to be named later, loading port to be named by us in ample time to give each loading vessel instructions before she would leave her next previous port of call.

On September 27, 1917, you wrote informing us in reference to the cargo of 1300 M feet to be delivered f. a. s. ‘W. H. Marston,’ that you would take

delivery of that cargo free alongside vessel at mill wharf and/or on barges a. s. t. mill wharf. On [84—20] October 1, 1917, we replied to this letter advising you, in effect, that we would not consent to a change of the contract so as to permit of your taking delivery of the lumber on a barge instead of on the 'W. H. Marston.' Your reply, ten days later, not only interpreted erroneously our refusal as a declination to deliver the lumber at all, but erroneously proceeded to read into the contract an obligation on our part to make delivery to a barge instead of to the 'W. H. Marston.' In our answering letter of October 12th, we hastened to correct your error in interpretation of our former letter, and advised you that on the contrary we stood ready to carry out our contract, though we still decline to change its terms in the way suggested.

The foregoing is a brief statement of the situation as shown by the correspondence, and if it calls for an expression of satisfaction on your part, we are also content, but there must be no misunderstanding. The 1300 M feet of lumber called for under the contract was sold for delivery f. a. s. 'W. H. Marston' at mill wharf, October to December, 1917, loading, and we decline absolutely to change the contract and make the delivery f. a. s. barge at mill wharf.

Trusting that there can now be no possible further misunderstanding of our position, we remain,

Respectfully yours,

DOUGLAS FIR EXPLOITATION & EX-
PORT CO.

By A. A. BAXTER,
General Manager.

(Testimony of W. Leslie Comyn.)

P. S.—If, as we have reason to suspect, you have now found that a mistake was made in contracting for October to December loading for the ‘W. H. Marston,’ and that other engagements will prevent that vessel making her December loading, we shall be glad to take the matter up with you anew under present conditions.”

WITNESS—(Continuing.) The “present conditions” as to the price of lumber at the date of this letter, which was October 19, 1917, were \$22.50 as against \$9.50. In other words, for the same lumber which our contract entitled us to at \$9.50 a thousand, we would have had to pay, under present conditions, as Mr. Baxter called them, \$22.50 a thousand.

Q. In that letter, there is a reference to the mistake that you had made in figuring that the “Marston” could make a loading date in December, 1917. I will ask you if, amongst exporters and shippers of lumber by sailing vessels, to what degree can you, a year, or a year and a half, or two years in advance, approximate the date at which a sailing vessel can make any [85—21] given port?

A. You cannot approximate it. The vessel is entirely dependent on acts of God, acts of kings’ enemies, restraints of rulers, and on wind, sea, and everything else; you cannot approximate it at all, especially during the war period, during the period when the war was on. This was right in the middle of the war period. There was delay at every port. The governments were holding up vessels right and left. You couldn’t tell a thing about it.

(Testimony of W. Leslie Comyn.)

WITNESS.—(Continuing.) To my actual knowledge, during this period there would be hundreds of cases of sailing vessels which were unable to fill engagements for given dates, say for a year or a year and a half in advance. The greater number of ships during 1916 and 1917 were late; they were held up by the Australian government both going down and coming back; the government was taking hold of them and forcing them, in many instances, to bring cargoes back when they were chartered to come back in ballast. It was a recognized fact in the export lumber trade that there was no certainty to be attached to the date that a sailing vessel might make. The Douglas Fir Exploitation & Export Company, from its inception, took copies of charter-parties of sailing vessels which it was anticipated that they would load cargoes upon. The "Guide" which is referred to in one of these papers is a shipping paper edited in this town. The Douglas Fir Company had absolutely the same facility of knowing the whereabouts of sailing vessels as anyone else. It had copies of the charter-parties and they could easily look it up, they have the "Guide" and they have the "Commercial News." I can give you a statement of where the "Marston" went and what she did in 1916 and 1917 if I can refresh my memory from a statement I made up. This statement is taken from the records of the Merchants Exchange. In January, 1916, she was in Adelaide, bound for Newcastle. [86—22] In March, 1916, she was in Newcastle, bound for Port Allen. In June, 1916, she was at

(Testimony of W. Leslie Comyn.)

Port Allen and passed Tattosh July 22d, and arrived in Eagle Harbor August 13th. In September, 1916, she was at Port Los Angeles and was bound for Adelaide, where she arrived December 18th. On January 17th, 1917, she sailed from Adelaide for Astoria, arriving there on May 8th. On June 15th she sailed from Astoria to Melbourne, and arrived at Melbourne on October 4th, and if she had promptly discharged her cargo on October 4th, 1917, at Melbourne, and immediately put about to return to Astoria, she could not have arrived there before January 1st. Under her charter-party, that is under the sub-charter, she was to come back in ballast. That was changed and she brought back a cargo of wheat from Melbourne at the request of the Australian government, from Melbourne to Astoria. She made no deviation at all. As a matter of fact, the loading of that cargo did not delay her over ten days. With respect to the effect on the speed that she would make coming with a cargo of wheat instead of coming in ballast, she would make better speed loaded than she would in ballast.

I recognize the letter you show me dated October 23, 1917, in response to the last letter which has been read, written from my firm to the defendant.

Thereupon Plaintiff's Exhibit No. 16 was admitted in evidence, and was in words and figures as follows:

(Testimony of W. Leslie Comyn.)

Plaintiffs' Exhibit No. 16.

“October twenty-third,

Nineteen seventeen.

Messrs. Douglas Fir Exploitation & Export Company,

260 California Street,

San Francisco.

Dear Sirs:

We acknowledge receipt of your letter of the 19th inst., file A-3279.

Confirming the writer's telephone conversation with your [87—23] Mr. Baxter yesterday, with reference to the cargo of 1,300,000 feet of Douglas Fir Lumber sold us f. a. s. mill wharf, Knappton and/or on barges a. s. t. mill wharf Knappton.

Please be advised that we will have barges alongside the mill dock on November 25th, next ready to take delivery of said lumber, and in the event of your failure or refusal to deliver, we will buy in the open market, and sue you for the damages sustained.

Very truly yours,

COMYN, MACKALL & CO.,

Per _____.”

WITNESS. — (Continuing.) We put barges alongside the mill dock on November 25th; I mean the mill wharf of the Knappton Mills, ready to take the lumber with our men ready to load it on to our barges. We did not get the lumber; they never cut a stick of it. The stevedores that we employed to take that lumber were Brown & McCabe. The let-

(Testimony of W. Leslie Comyn.)

ter which you show me from the Knappton Mills & Lumber Co., addressed to Brown & McCabe, Stevedores, dated November 28, 1917, is a letter that was forwarded to us by the stevedores. That was the mill that was to cut this lumber.

Thereupon Plaintiff's Exhibit No. 17 was admitted in evidence, and was in words and figures as follows:

Plaintiffs' Exhibit No. 17.

"Knappton, Wash., November 28, 1917.

Brown & McCabe, Stevedores, Inc.,

Portland, Oregon.

Gentlemen:

We have a notice handed us by your representative from Comyn, Mackall & Co., San Francisco, to deliver 1,300,000' of Douglas Fir.

We have no order to deliver any lumber to barges for account of Comyn, Mackall & Co., and therefore cannot consider your notice.

Very truly yours,

KNAPPTON MILLS & LUMBER CO.

By H. B. SETTEM,

Secretary."

(The letter was marked Plaintiff's Exhibit 17.)

[88—24]

Q. In the practice of the export lumber trade, what difference would there have been in the operation of the delivery of that lumber to these barges if, in point of fact, the Knappton Mills & Lumber Company had delivered it, if the "Marston" were

(Testimony of W. Leslie Comyn.)

lying alongside the barges, or if she was not lying alongside of them? What difference would there have been in the action required of the Knappton Mill & Lumber Co.? A. Not a thing.

Thereupon Plaintiff's Exhibit No. 18 was admitted in evidence, and was in words and figures as follows:

Plaintiffs' Exhibit No. 18.

“November thirtieth
Nineteen-seventeen.

Messrs. Douglas Fir Exploitation & Export Com-
pany,
260 California Street,
San Francisco.

Dear Sirs:

Referring to our purchase of 1,300,000 Douglas Fir, October/November/December, delivery, at \$9.50 f. a. s. mill dock and/or barges:

This cargo was to be supplied by the Knappton Mills and Lumber Company, Knappton, and on the 26th of this month we had barges alongside their dock ready to take delivery, but they, acting as your agents, refused to supply the lumber. This is a breach of contract.

We are, therefore, compelled to go into the open market and buy against you, and now notify you that we will sue you for breach of contract in the amount of damages sustained by us.

Very truly yours,
COMYN, MACKALL & CO.,
By _____.”

Thereupon Plaintiff's Exhibit No. 19 was admitted in evidence, and was in words and figures as follows:

Plaintiffs' Exhibit No. 19.

"San Francisco, December 1, 1917.

Messrs. Comyn, Mackall & Co.,
310 California Street,
San Francisco.

Gentlemen:

'W. H. MARSTON.'

We acknowledge yours of November 30th and shall await [89—25] your future action.

Very truly yours,

DOUGLAS FIR EXPLOITATION & EX-
PORT CO.

By A. A. BAXTER,
General Manager."

Thereupon Plaintiff's Exhibit No. 20 was admitted in evidence, and was in words and figures as follows:

Plaintiffs' Exhibit No. 20.

"San Francisco, January 2, 1918.

Messrs. Comyn, Mackall & Co.,
310 California Street,
San Francisco.

Gentlemen:

'W. H. MARSTON.'

Referring to contract of sale for this cargo, dated November 2, 1916, which provided for October/November/December 1917 loading. As this

(Testimony of W. Leslie Comyn.)

vessel has not yet arrived at loading port and the time has expired by limitation, we beg to now advise we have today cancelled this cargo on our books.

Very truly yours,
DOUGLAS FIR EXPLOITATION & EXPORT CO.

By A. A. BAXTER,
General Manager."

WITNESS.—(Continuing.) The Knappton Mills had not cut any of this cargo; under the practice in the lumber trade, an order of this sort is cut to the specifications furnished by the buyer. We had furnished the specifications for this lumber. As a matter of fact, not a stick of it was cut by the Knappton Mills. It never was cut.

Thereupon Plaintiff's Exhibit No. 21 was admitted in evidence, and was in words and figures as follows:

Plaintiffs' Exhibit No. 21.

"Sept. 20th, 1917.

Knappton Mills & Lumber Co.,

Knappton, Wash.

Gentlemen:

'W. H. MARSTON.'

The above vessel is ninety-six days out from the Columbia River for Melbourne and even though she should arrive there today there is very little chance of her discharging her cargo and returning in time to commence loading in December. We

(Testimony of W. Leslie Comyn.)

have today received specifications for her cargo, which is an excellent [90—26] cargo to cut being Melbourne specifications, but we are not sending them forward to the mill as every indication is that the cargo will be canceled.

Very truly yours,

DOUGLAS FIR EXPLOITATION & EXPORT CO.

By _____,
General Manager."

Thereupon Plaintiff's Exhibit No. 22 was admitted in evidence, and was in words and figures as follows:

Plaintiffs' Exhibit No. 22.

"October 8th, 1917.

Knappton Mills & Lumber Co.,

Knappton, Washington.

Gentlemen:

'W. H. MARSTON,' ORDER No. 38:

Referring to our order as above, this vessel arrived in Melbourne October 4th and therefore has practically no chance, after discharging there, of arriving at your mill during December. We have the specification, but have not forwarded it to the mill as we propose to cancel the cargo, but cannot legally do so until the last day of December.

Very truly yours,

DOUGLAS FIR EXPLOITATION & EXPORT CO.

By _____,
General Manager."

(Testimony of W. Leslie Comyn.)

WITNESS. — (Continuing.) Subsequently we bought an equivalent quantity of lumber from Dant & Russell. The contract which you show me purporting to have been entered into between ourselves and Dant & Russell is the contract for the lumber which we bought. It specifies \$22.50 a thousand. That was the market price at that time. It was the best price I could get.

Thereupon Plaintiff's Exhibit No. 23 was admitted in evidence, and was in words and figures as follows:

Plaintiffs' Exhibit No. 23.
COMYN, MACKALL & CO.
Successors to
BOWRING & COMPANY.
LUMBER CONTRACT.

"Bowring & Company
New York.
Correspondents
C. T. BOWRING & CO., LTD.,
Liverpool, London and Cardiff
———
Bowring Bros., Ltd.
St. John's Newfoundland

Cable Address
'Bowring' San Francisco
———
Codes:
Hinrich's, Watkin's,
Premier, A. I., A. B. C., 5th
Western Union
Lieber's Scotts 10th
and private.

THIS AGREEMENT, made and entered into this 7th day of [91—27] December, 1917, by and between COMYN, MACKALL & CO., of San Francisco, California, as buyers, party of the first part, and DANT & RUSSELL, of Portland—Oregon as sellers, party of the second part;

WITNESSETH: That the party of the first part hereby agrees to purchase, and the party of the sec-

and part hereby agrees to sell One million three hundred thousand (1,300,000) feet B. M. Douglas Fir Lumber merchantable and select (called Oregon Pine), on the terms and conditions as hereinafter provided for:

QUANTITY: As stated above, fifteen (15) per cent more or less at buyer's option, or sufficient to give a full and complete cargo to the vessels chartered to load under this contract.

Price: \$22.50 net (Dollars) U. S. Currency per thousand feet B. M., for such lengths and sizes in rough merchantable and select grade, as are listed in Export G List as base price; all extras and deductions payable as per such list, unless otherwise agreed hereafter.

DELIVERY AND/OR SHIPMENT: At buyer's option, during expected Feby/March/April 1918 according to specification, at the rate of not less than seventy thousand (70,000) feet B. M. per running day, Sundays and legal holidays excluded, free alongside and within reach of ship's tackles. Shipment by *sailer* at buyer's option. Delivery to be made in accordance with usual form of charter-party, and sellers to be responsible to the ship for any demurrage or damages occasioned by their own negligence or default.

PAYMENT: Sellers to send full and complete documents (as required) direct to buyer; buyers to remit in cash within four days after receipt of all documents covering a complete cargo by any one vessel or steamer.

QUALITY: Usual grade of Rough Merchantable and Select Douglas Fir Lumber (other grading conditions as per Export G List).

SPECIFICATION: To be given to sellers not later than Sixty (60) days before estimated arrival of vessel by which such specification is intended for shipment.

Specifications to be prorated, each size proportionately to suit capacity of vessel or steamer chartered or hereafter to be chartered to load under this contract.

INSPECTION AND TALLY: To be made at the expense of the seller by inspectors of the Pacific Lumber Inspection Bureau and its certificate to be final.

Buyers have the right to appoint a private Surveyor or Inspector, who shall have the right to reject any piece or pieces which, in his opinion, are not up to grade. Should the sellers dispute the decision of the Private Inspector, any pieces so in dispute shall be put aside and their grade determined by the Chief Inspector of the Bureau; sellers and buyers to share equally the pay and expenses of such private Inspector.

STOWAGE: If required by buyers, to be supplied by seller in laths, pickets and/or 12 to 15 feet lengths of such sizes and quantities as ordered by buyers. [92—28]

MANUFACTURE: The lumber purchased hereunder to be that of the manufacture of some reputable Columbia River Mill, and the party of the

(Testimony of W. Leslie Comyn.)

second part agrees that the lumber shall be evenly sawn, and properly trimmed.

Buyers not to be responsible for any consequences arising through the delay, damage or loss of the vessel (s) chartered to load under this contract, nor for the failure of the vessel or her owners to fulfill the charter-party, nor for breach of charter-party on the part of vessel, its owners and/or agents.

To the true and faithful performance of each and all of the foregoing agreements, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators and assigns, each to the other in the penal sum of actual damages.

IN WITNESS THEREOF, we have hereunto signed our names.

Executed in Triplicate.

Witness:

B. M. WADE.

COMYN, MACKALL & CO.,

By CLAUDE L. DALY."

WITNESS.—(Continuing.) The difference between the contract price for the lumber that we had to pay to Dant & Russell and the contract price we would have paid to Knappton Mills if they had carried out their contract with us, was that one was \$22.50 net and the other was \$9.50 less $2\frac{1}{2}$ and $2\frac{1}{2}$. It figures out \$17,511, that is the difference in price for the 1,300,000 feet of lumber. To the best of my knowledge and belief that is the difference between the price we actually paid for the lumber and

(Testimony of W. Leslie Comyn.)

the price we would have paid if the Knappton Mills had delivered it. I have not personally worked it out, it was worked out in my office. I verified our complaint. I believe that it is alleged there that the difference was \$17,511. We furnished that figure to you. I didn't work it out personally in the office, but it was worked out by my office. The allegation in the complaint that we expended \$304 in preparing to take delivery of this lumber on the barges is true. I have testified that we had a sub-charter on the "W. H. Marston." That subcharter was made up by us prior to the time that this contract was made for this lumber. [93—29]

Q. Prior to the month of October, 1917, and prior to the time that Mr. Baxter wrote you substantially that he would not deliver this lumber except to the "Marston" within that year, was there any modification or change made in that sub-charter.

A. None at all by us; may I make an explanation?

Q. Yes, certainly.

A. The boat was originally chartered by J. J. Moore, from the owners. She was sub-chartered to us by J. J. Moore. J. J. Moore approached us and wanted to load that vessel with wheat from Melbourne to Astoria. We asked Mr. Baxter if he would object, and he said yes, he would object. That was before any question came up as to the boat not being on time—because he wanted to get out of his contract if he could. We said to Moore, we are not varying this contract. If you can make

(Testimony of W. Leslie Comyn.)

an arrangement with Mr. Baxter yourself so that you can vary our contract, as well as your charter, you can go ahead and do it. Then J. J. Moore offered Mr. Baxter \$2,500; we didn't offer Mr. Baxter \$2,500.

WITNESS.—(Continuing.) We didn't offer it to him. J. J. Moore & Co. offered Mr. Baxter \$2,500; they were the original charterers; we were the sub-charterers. Under the sub-charter, after the "Marston" reached Melbourne, she was to return in ballast. In point of fact, she returned with a cargo of wheat. That was a modification of the sub-charter. That modification was made only after Mr. Baxter had positively declined to deliver that lumber to the "Marston." It was long after we knew that the "Marston" could not make the loading date, December, 1917. We received a consideration for permitting the "Marston" to load wheat instead of coming back in ballast. It was admitted by everybody that whether she would come back in ballast or whether she would be loaded with wheat, she could not have gotten here by December 31, 1917. It [94—30] was only when he declined to give us that lumber that we said there was no use throwing good money after bad. The letter which you show me to refresh my memory from J. J. Moore & Co., dated October 17, 1917, fixes October 17, 1917, as the exact date when we agreed to this change in the course of the "Marston" by which she was to take wheat instead of coming back in ballast. We received \$5,000 for agreeing to that. [95—31]

Testimony of C. E. Dant, for Plaintiffs (In Rebuttal).

C. E. DANT was called as a witness on behalf of plaintiffs in rebuttal, out of order, and being first duly sworn, testified as follows:

My name is C. E. Dant, and I reside in Portland, Oregon. I am in the lumber business, being actively engaged in the export lumber business and in the domestic business. I am not interested in any lumber-mills. I export lumber for mills that are not in the combination known as the Douglas Fir Exploitation & Export Company. I buy from such mills. I have been in the lumber business in Portland for seventeen years. I should say that I do an export business with an annual volume of approximately 100,000,000 feet, buying and selling 100,000,000 feet annually. The ships which we handle are handled over and over again, being the same ships, but I should say that we handle annually 50 cargoes anyway, and have done this for the last two or three years. We have a very active business, and have had since prior to the time of this controversy, which arose in 1916. The f. a. s., which is an expression in the contract introduced in evidence here, means free alongside the mill wharf. Standing by themselves, the initials, or those three letters, mean "free alongside." If it says "f. a. s. vessel" it means free alongside on the mill wharf where the vessel can get it. If the delivery is on barges it is the same thing. With reference to the obligation of the seller, if he says he will make a delivery f. a. s. vessel or f. a. s. mill wharf, it means

(Testimony of C. E. Dant.)

just that he will put it on the wharf where the buyer can come and get it, or the vessel can, or the barge. After he has put it on the wharf he has no obligation.

I am familiar with the purchase and sale of cargoes of export lumber for sailing vessels. It is sometimes customary to name a sailing vessel in the contract at the time the order for lumber is placed. You could not tell very closely in my business in 1916 [96—32] at approximately what date a sailing vessel could make a loading port, a year and a quarter forward. So many things happen to a sailing vessel. In my business I have known it very often to be customary to substitute vessels where the sailing vessel named could not make a loading port, or was lost or disabled. That is very often done. I am familiar with the organization known as the Douglas Fir Exploitation and Export Company. Prior to October, 1916, when that company commenced active operations, I knew of cases where a cargo of lumber was bought and a sailing vessel was named and the cargo to be taken at a certain period or certain time, and the sailing vessel could not make that date. I have known cases in which the time for that vessel to take delivery of that cargo was extended. I have known such cases frequently.

Mr. SUTRO.—Q. Do you know of any case in your experience, prior to October, 1916, where the seller of lumber refused to extend the time for de-

(Testimony of C. E. Dant.)

livery because the vessel could not make the loading date?

Mr. McCLANAHAN.—I object to that as immaterial.

Mr. SUTRO.—I don't know whether it is or not. The purpose is to show that we had no recourse but to take the lumber on barges. They said that they would not give it to us after the date named.

Mr. McCLANAHAN.—But that was because of the contract.

Mr. SUTRO.—You stood on your contract.

The COURT.—Let him answer.

To which ruling the said defendant duly excepted and now assigns the same as error.

EXCEPTION No. 3.

WITNESS.—(Continuing.) I know of no such case. Lumber is sometimes delivered, in the ordinary course of business, to barges. We have delivered it on barges several times. When liners are loaded at Puget Sound or the Columbia River, they are sometimes loaded either from barges or sometimes they go to the mill wharves. In [97—33] in October, 1916, there was no custom in the lumber trade which entitled a mill to refuse to deliver a cargo of lumber because a vessel that had been named by the buyer as the vessel in which it expected to export that lumber was not tendered. If there was such a custom I never heard of it. There was no custom that I know of at that time which entitled the mill to refuse to make delivery to barges of a cargo of lumber where the

(Testimony of C. E. Dant.)

vessel that had been named by the buyer was not produced. There was a custom under which the mill was required to deliver a cargo of lumber that had been contracted for, where a vessel had been named, either to that vessel at a date later than her loading date, or to barges, within the time fixed in the contract. I think that that custom was well established.

Mr. SUTRO.—Q. Did you, yourself, make delivery to barges, where the vessel that had been named could not make the loading date, and the mill refused to permit the substitution of another vessel? Have you done that?

A. The mills never refuse, but we have delivered on barges.

WITNESS.—(Continuing.) We have delivered on barges where the dock would be blocked up with lumber and the mill wanted to get rid of it. We have taken it off on barges and stored it until the vessel arrived. I think that since the war started probably between sixty and eighty per cent of the sailing vessels taking cargo under lumber contracts such as the contract here in controversy have been late. As a custom of the trade, I think that the mill is entitled to insist on delivery within the time specified in the contract, but it is not entitled to insist that the buyer, after the mill delivers the lumber to him, put it on a ship that has been named. The mill does not put lumber on the vessel; it puts it on the wharf, and the buyer takes it. With regard to whether it is more convenient for the seller

(Testimony of C. E. Dant.)

to take it to barges, or alongside the mill wharf, or to take it to a vessel, I think it is just about the same. It is a [98—34] little easier on barges. It is a little easier for the mill. They can take it faster on barges.

Mr. SUTRO.—Q. According to the custom of your trade, and all my questions relate to October, 1916, was there any custom with respect to the quantity that a contract covered which called for, say, 1,300,000 feet, 15 per cent more or less, to suit capacity of vessel, if that vessel was not produced?

A. Then they would deliver the exact amount, approximately.

WITNESS.—(Continuing.) If some other vessel were produced they would deliver the exact amount. I sell for lumber mills as well as buy for them.

Cross-examination.

I am what is called one of the outsiders in the trade, and by that it is meant that I am a man who is not affiliated in any way with the Douglas Fir. They won't sell to us, and I think that is the position of Comyn, Mackall & Company—that they are outside the combination. Comyn, Mackall & Co. and I belong to the outside group of exporters. So far as we are concerned, it is a friendly rivalry between us and the Douglas Fir; that is, so far as Dant & Russell are concerned. I cannot say that there is any feeling between us and the Douglas Fir.

I have had considerable experience in exporting lumber. Most of my sales are of cargo lots or parcel shipments. When I purchase lumber I send the mill

(Testimony of C. E. Dant.)

an order for it, part of which is a printed order, and part of which we fill in. It is a regular form which we have. Sometimes we buy cargo lots and name the carrying vessel in the order. That has quite often been done by us. At the present time steamers carry more of the cargo business than sailing vessels. In 1916 and 1917 steamers and motor ships and sailing vessels carried most of it, anything that we could get hold of. In making a contract for a cargo lot to a named sailing vessel, putting in the contract [99—35] the name of the sailing vessel is merely an incident. At the time we put that in we expect that that vessel will be the vessel that we will load. That is the expectation of both the buyer and the seller. Our contracts where we have named a sailing vessel to carry the cargo, with the expectation that she will carry it, generally provide for some long period, which we will call the delivery. They usually do, such as 60, 90, 100 or 120 days. The object of providing that long delivery date is the estimated time that the vessel will arrive at the loading port.

Mr. McCLANAHAN.—Q. This order, then, with the long delivery date, the named carrying vessel, and the amount of lumber purchased, is sent to the mill; is there any benefit that the mill derives in such an order through the naming of the vessel?

A. They can look the vessel up if they choose to keep track of the vessel.

WITNESS.—(Continuing.) They can find out when they will be called upon approximately to fur-

(Testimony of C. E. Dant.)

nish the lumber. When they want that information they look up the position of the vessel, and they do that by an examination of the shipping papers, what we call the "Guide." The "Guide" is a recognized shipping journal which keeps track of the movements of sailing vessels. When the mill has this order presented to it, that they are apt to be called upon in 90 days for the delivery of a certain amount of lumber to a particular named vessel, they can look up in the "Guide" and find out approximately where that vessel is and then approximate when she will be due at the loading port. That is of value to the mill, in that it gives the mill some idea as to when it shall commence to cut and have the lumber ready. This lumber is all sold under specifications when it is sold to Australia. These are called "Australian specifications." Until the new list was adopted I was selling lumber in 1916 and 1917 under the "G" list as the base. I do not know when [100—36] the new list was adopted. There is now an "H" list also, but at that time, in 1916, assuming that the "G" list was in force, I sold lumber under the "G" list. The cargo which we are speaking of was sold under the "G" list, and the "G" list furnishes the base price for the specification lumber to be loaded on the vessel. The Australian specifications are specifications of different lengths, breadths and sizes of lumber. When you sell lumber under "G" list, this base price of "G" list is the basis from which you derive the price of different sizes, lengths and breadths of specifications. It does not mean, for in-

(Testimony of C. E. Dant.)

stance, if "G" list base price was \$9.50 that all specification lumber was sold at \$9.50; but it does mean that \$9.50 is taken as the base and that from that you figure what the different specifications, lengths and breadths and sizes are to be invoiced at. These provisions in the "G" list were provisions for the benefit of both the buyer and the seller. The "G" list is and was one for the pricing of lumber sold for export. Generally, our contracts for cargoes, where they are for a named vessel, estimate the amount of the lumber that that vessel will carry. That estimate of the amount of lumber is put down in so many figures, and it is customary to add to the estimate a limitation of 15 per cent or ten per cent more or less. It is also customary in our contracts to add after the expression "15 per cent more or less," or a certain per cent more or less, to suit the capacity of the vessel. In these sales of cargo lots to Australia made under specifications and made under the terms of "G" list, the idea prevails that a vessel is to be furnished for the carrying of the lumber. I would say that the particular term respecting the place of delivery of the cargo is a matter of contract between the parties. They can contract to deliver almost anywhere they please. They can contract for the seller to deliver the lumber almost anywhere. I understand that the contract which we have been talking about is [101—37] what is called an f. a. s. contract. It is known to the trade as an f. a. s. contract. The "f. a. s." distinguished this from an f. o. b. contract, which would be different. An f. o. b.

(Testimony of C. E. Dant.)

contract is more aptly a contract which applies to land transactions; "f. a. s." is a water contract, or a contract that applies to water-borne commodities, but "f. o. b." might mean f. o. b. the vessel. It is more common to use "f. o. b." in connection with railroad trains and with warehouses and with things of that kind, and "f. a. s." is used in connection with water-borne commodities. I have superintended or supervised the loading of vessels. In summer a vessel will take more than it will in winter, and the amount which the vessel takes depends somewhat upon the way she is stowed in the hold. The amount which the vessel takes depends also upon the height of the deckload, and the height of the deckload, in turn, is controlled by the discretion of the master of the ship and the surveyor. The same vessel will vary in the height of her deckload. If the stowage is poor, then they could not take so much of a deckload. It is a question of stability. It might be that the amount which a vessel takes is controlled somewhat by the condition of the lumber at the time she is loaded, as to whether it is wet or dry, it being a question of weight. Wet lumber weighs more than dry lumber. Sometimes you will get dry lumber in the hold and wet lumber on top, and then she will carry less than if it were all wet; that is to say, if it were all wet she might carry less than if half was wet and half was dry. If you had the dry lumber on the bottom, she would not carry a big deckload. So that the condition of the lumber at the time of loading is a small

(Testimony of C. E. Dant.)

factor to be put in the question of how much the vessel could carry. The season of the year makes a little difference with the carrying capacity of the same vessel. No matter how well a vessel may be known to you, or how often you have used her, you can only approximate what she will load at a given time, within 5 or 10 per cent, [102—38] maybe. I have known sailing vessels to carry 40,000 or 50,000 feet more at one time than at another. In this hypothetical contract which we have been speaking of, although there is a named amount of lumber governed by the limitation of 15 per cent or less, you could not exactly tell just what that contract is going to invoice until the lumber is actually put into the vessel in the specification lengths, breadths and sizes. If you have a contract that calls for specification lumber to suit the capacity of one ship, you could not tell exactly whether that contract lumber will load into another ship, unless you know what the contract ship will carry. It is all a question of approximation, and when you put into the sales contract of a cargo "f. a. s." for a named vessel this definite number of feet 15 per cent more or less to suit the capacity of the vessel, it is simply what the parties have agreed upon as approximately what they believed the vessel would carry. If that vessel did not come, and we had a contract for 1,300,000, we would deliver the exact amount then. When I say "We," I mean Dant & Russell or any of our mills, any of the outside mills. If the contract calls for a named vessel, as the seller I am privileged to change it to

(Testimony of C. E. Dant.)

something else. There would be no generosity about it; I would simply be delivering the lumber I sold. The lumber I sold would be 1,300,000 feet, if that is all I had sold. Supposing that my contract was 1,300,000 feet plus 15 per cent more or less to suit the capacity of a named ship, we would deliver the 1,300,000 feet. We never get down that fine. The contract was for either 1,300,000 feet, or more or less, to suit the convenience of the size of the vessel. I would say 15 per cent more or less, but if the vessel did not come, then I would deliver 1,300,000 feet exactly. If the vessel did not come, and I delivered 1,300,000 feet, there would be no necessity for my inserting in the original contract "15 per cent more or less." With reference to the delivery of an f. a. s. cargo, it is the custom [103—39] to deliver it on the mill wharf f. a. s. the wharf, on that portion of the wharf where it can be loaded from the mill wharf on to a vessel or a barge or where the buyer can come and take it, and if it is a named vessel it is the custom to load it on to the wharf where the named vessel can take it at her tackles, or any other vessel. If the contract calls for a named vessel, that is a mere incident, that has nothing to do with it.

Mr. McCLANAHAN.—Q. You still, however, say that it is a benefit to the mill to have a named vessel in the contract in order to be forewarned and forearmed as to when he will have to have the cargo ready?

A. He knows he has to deliver that lumber in a certain time; if the vessel is late, and he chooses to wait for it, all right.

(Testimony of C. E. Dant.)

WITNESS.—(Continuing.) If the certain time was November/December, he could keep track of that vessel, or if it suited him or he wanted to demand that the buyer take the lumber at that time, he could do it, and he would do it if the mill objected to waiting for the vessel—the buyer would do it. It would be customary, so far as I know, for the mill to wait for the vessel, but sometimes they would have the lumber cut, or they would want to cut it at a certain time, and they have insisted that we move it within the sales date; for instance, October/November/December. In such cases we have then taken the lumber on barges and stored it somewhere until the vessel arrived. With regard to whether or not there is a custom which requires a mill to cut and have ready the contract lumber at any time within the October/November/December delivery period that the seller may demand, we usually keep closely in touch with the mill and tell them when we want the lumber. There is a custom that the buyer can demand from the seller a delivery of the lumber at any time during October/November/December delivery period, giving him reasonable notice. If he sold for a certain vessel, and that vessel was going [104—40] to get there within the delivery date, then he would keep track of the vessel and be ready for it when it came. That would be the custom. With regard to whether a custom overrides the contract, that is a matter of law. I am not a manufacturer of lumber. When I say that I have delivered lumber on barges I mean that I sell for the independ-

(Testimony of C. E. Dant.)

ent mills, the same as Mr. Baxter does for the combine. I place my order with the independent mill, and the independent mill has made delivery on barges. They have done that in contracts for cargo lots. The circumstances under which this was done were that during the war we had a lot of railway ties going to England and the boats were commandeered. In one case they were the boats named in the contract, and we took eight or ten barges and loaded that stuff up and took it down to Kalama, about 40 or 50 miles down, and stored it on the docks there until the buyers could get a vessel, and that was for the benefit of the mill and the buyer, too. We could have sold those ties at double the money. The mill had some of the ties and they cut out the balance. The mill was allowed to put the ties on to barges furnished by the buyers. It was no accommodation; the mill would have been glad to keep them. That was because the price was higher. I can give you other instances if you want them. This custom with reference to the delivery of cargo lots is recognized among the mills in the north. It was recognized among all the mills until the combination tried to change it. I do not know, but apparently it is not the custom of the combination. With regard to what proportion of the mills is represented in the combination, I think they probably ship about 50 per cent. I would not say that 85 per cent of the export mills are represented in the combination. Some of the outside mills are very large ones. I presume that of the mills that ordinarily have done the ex-

(Testimony of C. E. Dant.)

port business 50 or 60 per cent are in the combine. I said that this custom that I speak about is recognized by all the outside mills. I said that [105—41] the combination mills have tried to change it. Prior to the time of the formation of the combination, as I understand it, all of the mills recognized this custom. In November and December, 1916, it was all taken out of their hands then and put into the hands of Mr. Baxter. In November and December, 1916, all of the independent mills recognized this custom, so far as I know. That would be 40 per cent. Those mills are on this coast, and I am speaking only of export mills. When we insure these cargo lots of lumber, we have sometimes insured the cargo for the buyer on the wharf after we have moved it. In a case where the delivery is f. a. s. vessel mill wharf, it depends entirely upon your sale. If we have sold it on the mill wharf and get the stuff ready for the buyer, he might want to insure it, because if he was late he might want to insure right there to cover any question. This year we had a couple of cargoes of big shooks going to Honolulu. We put them all on the dock at Astoria. It came to a couple of hundred thousand dollars. The boats were late. We took it up with the buyer and notified him that the cargoes were on the docks at Astoria, and he asked us to have them insured. Ordinarily, the delivery of a cargo under an f. a. s. contract is effective only after the lumber is placed in the slings of the exporting vessel, because ordinarily it comes right on to the vessel. If the buyer furnished the vessel on time,

(Testimony of C. E. Dant.)

his insurance would take effect at the time the lumber is placed in his possession. Ordinarily, so long as the cargo remains upon the dock and has not passed into the slings of the vessel, the insurance attaches on the dock in favor of the seller. It would not be possible right down to the fine point to deliver to a barge or barges the specification lumber that would suit the capacity of any named vessel, unless you knew what the vessel's capacity was. In loading the barge with such lumber we would measure up the amount we had sold and put it on the barge. We would put it on any way, to make [106—42] her staple. In loading that lumber on a vessel we would perhaps stow it different and in a better way than if we loaded it on the barge. If the barge were large enough you could stow on one barge the carrying capacity of the "W. H. Marston." Usually, I think that they take about 500,000 or 600,000 feet, and if the "Marston" took 1,300,000 feet, or anything like that, you could not load on one barge her capacity. You would have to put it on two or three. In loading those barges one at a time, or all together, the matter of how the vessel would stow that same cargo would have nothing to do with it, because you would take the lumber off the barge on to the vessel, just the same as you would from the dock on to the vessel. I would load the amount called for in the contract, without reference to the carrying capacity of the vessel. It would be approximately that amount. I would not simply load approximately what the carrying capacity was; I would load

(Testimony of C. E. Dant.)

1,300,000 feet. I would load 1,300,000 feet in case the vessel was not there.

I loaded the "Marston." This cargo that was sold under the contract in suit for the "W. H. Marston" was purchased of me. There was a cargo purchased from us. That is my contract which you show me. The cargo was loaded on the "W. H. Marston." I do not know, without looking at it, whether it was loaded on May 6, 1918, or not. You see, a vessel like that is quite a while loading. It might be thirty days. I do not know that this contract calling for 1,300,000 feet was not loaded on the "Marston." I know that we loaded on the "Marston," but I don't remember what she took. I don't know that she did not load 1,300,000 feet. I do not know whether she loaded more or less. They never do load exactly the amount. I presume that we furnished an invoice for this cargo, but I have not it with me. The cargo was loaded according to the Australian specifications furnished me. I do not know whether those specifications were the same specifications furnished to the Douglas [107—43] Fir. This invoice, which I do not remember about, would be based upon and made up from the "G" list as a basis, and the prices on which the figures on the invoice ultimately came to would be the different prices under "G" list applying to the different sizes and breadths of lumber in the invoice. It would not matter whether the specifications were the same or not, because we would charge the base of what we shipped, the same as the Douglas Fir would. We

(Testimony of C. E. Dant.)

would charge for the different lengths and sizes that went into the "Marston." The prices for those different lengths and sizes would be different. I am sure that the vessel was loaded to her capacity, but we keep on loading until the captain or the surveyor stops us. Our contract calls for a complete cargo for the vessel. The "Marston" was loaded in Portland at the Inman & Paulsen Lumber Company. This company is not one of the combine, it being an outside mill.

Mr. McCLANAHAN.—Q. An outside mill?

A. Yes.

Q. This contract of yours for this cargo for the "Marston" embodies the terms under which you usually make f. a. s. cargo sales for export?

A. That is Mr. Comyn's contract, which I presume he signed.

WITNESS.—(Continuing.) In the usual course of business we would sign these contracts in duplicate. Sometimes we do not. For all that I know, this contract was carried out and the invoice was based on the actual amount loaded on the vessel. I do not know how much that was.

Mr. McCLANAHAN.—Q. Why didn't you invoice to the buyer 1,300,000 feet?

A. We invoiced the amount we shipped, whatever that was.

WITNESS.—(Continuing.) It was the cargo for the "W. H. Marston" that we shipped. We invoiced whatever we shipped. There is [108—44]

(Testimony of C. E. Dant.)

nothing in our contract about the nonappearance of vessels. We have very little in our contract.

This information which is contained in the "Guide" as to the movements of sailing vessels is one which is open to everybody who takes the "Guide." I suppose that the naming of a vessel in a f. a. s. contract gives to the seller some measure of assurance as to when he will have to cut that lumber. In a sale made under the "G" list by the Douglas Fir Exploitation and Export Company, the naming of an export vessel gives to the seller some measure of assurance that the lumber will be exported. They know that it will be exported because it is always higher priced than domestic, and you could not sell it domestic. I presume that the naming of an export vessel as the carrying medium or the receiving medium for the cargo gives to the Douglas Fir some measure of assurance that it will be exported. I do not know that the Douglas Fir cannot handle Douglas fir except for exporting it. I could point out a case where the Douglas Fir did sell that lumber for other than exporting. The price is usually higher for exporting. The specifications are different. They would not want it any place else.

Redirect Examination.

You cannot sell the Australian specification lumber in this country. During the war the Douglas Fir handled a large number of aeroplane cants that went to the aeroplane factories. I have said that I have known of cases where the quantity estimated

(Testimony of C. E. Dant.)

was exceeded by 40,000 feet. That would be about 5 per cent of the ordinary sailing cargo. If you had a 15 per cent more or less clause, the excess of 40,000 feet over the stated amount would be within 15 per cent. We are in competition with Mr. Comyn in business. I think that it is active competition. I have heard of innumerable cases of sales f. o. b. vessels or f. o. b. steamers. We have chartered it that way ourselves. It is a usual term in the business. In [109—45] the export lumber trade on Japanese steamers we usually charter that way. An f. o. b. sale does not necessarily mean a land sale. The case that I told of, where ties had been sold for delivery to a vessel which could not make the loading date, was one which concerned the Inman-Paulsen, the North Pacific, and the St. Johns Lumber Company. The ties, upon the vessel not making the loading date, were delivered on to barges. I do not know just what the difference in the value between the ties at the time they were loaded on to the barges and the contract price would be, but we sold them very cheap, at, I think, about \$9.50, and they went up to about \$37.50. They were worth double anyway. The difference in money would total about \$50,000. Those ties were delivered to barges. A part of the ties had been cut at the time that it was ascertained that the vessels could not make the loading date. The mill proceeded to cut the balance of the ties when we got ready to move them on the barges. The mills did not have all the

(Testimony of C. E. Dant.)

ties cut at the time it was known that the vessels could not make the loading date.

Another instance of delivery to barges where the vessel was late for a loading date was in the case of the schooner "George E. Billings." We made a sale for that boat, that vessel being named. She was late, so the mill insisted that they would not make delivery after the contract had run out, so we put barges alongside, and they loaded the barges, or they gave us the lumber and we loaded it on the barges and took it up to the Pacific Coast Coal Company's dock and discharged it there.

Mr. SUTRO.—Q. Who was the buyer in that case.

A. Neal Nilson. He was buying for the Australian government.

WITNESS.—Continuing.) The quantity of lumber involved in that contract was, if I remember rightly, about 1200 or 1300 feet. That lumber was loaded on to barges. The customs which I have testified to were the customs of the mills, so far as I know, prior to the [110—46] combination, or prior to the time that the Douglas Fir Company became active, about November or December, 1916.

Recross-examination.

The sale of the ties I speak of was made under a contract, and the sale of the "Billings" cargo was under a contract. I have not those contracts with me. I was a party to those contracts, in that I represented the mills or the seller.

Testimony of W. W. Payne, for Plaintiffs.

W. W. PAYNE was called as a witness on behalf of plaintiffs, and being first duly sworn, testified as follows:

I am a lumber merchant connected with the Pacific Export Lumber Company, with headquarters at Portland, Oregon. My residence is Portland. I have been engaged in the lumber business about fifteen years, and have been in the export lumber business since 1906 with the Pacific Export Lumber Company. I might say in a general way that I have been with them constantly. The Pacific Export Lumber Company handles approximately 50,000,000 feet annually, I suppose. Occasionally we have had to handle cargoes on vessels. We have represented both the buyer and the seller during our experience. Our general business is that of buyers. We represent the buyers. Prior to November, 1916, we bought generally and not from any particular class of mills. After the organization of the Douglas Fir Exploitation and Export Company, our purchase from mills was restricted, in that we bought from what was known as outside mills at that time. We did buy some from the Douglas Fir up to a recent date. In the trade the term f. a. s. stands for free alongside ship. It is a general term which means free alongside the carrier, whatever you are going to take it from. F. a. s. mill wharf means that the seller is to put the lumber along on the mill wharf, where it can be taken by the carrier. In my opinion, an interpretation of that phrase it does not make any

(Testimony of W. W. Payne.)

difference what kind of a carrier [111—47] it is that takes it. I have seen the “G” list. I have not any definite recollection of the wording of that list.

Mr. SUTRO.—Q. The term is there defined as “free alongside”; is that a correct definition of the term f. a. s.?

Mr. McCLANAHAN.—If the Court will turn to the “G” list, I think you will find that that is not an exact statement of what that means.

The COURT.—Free alongside within reach of ship’s tackle. There seems to be two definitions, or a division there. It says, “Free alongside,” and then there is a semicolon, and then it says, “within reach of ship’s tackle.”

WITNESS.—(Continuing.) I have known of lumber that was sold under export contracts, where the vessel was named. I have known of cases where the vessel was named and was late in making the loading date. According to the custom of the trade in October and November, 1916, with reference to waiting for a vessel that had been named and could not make her loading date, there is no particular reference to those special dates. In our business, if a vessel was late, when she got there she got her cargo. It was the custom to load the vessel although she arrived late, so far as I know. That would be my idea of it. I did not know of any custom in October, November and December, 1917, which would enable a mill to refuse to deliver a cargo of lumber or a lot of lumber that had been sold, merely because the vessel could not make her loading date.

(Testimony of W. W. Payne.)

It never came up in my experience. There is nothing very unusual about the delivery of lumber sold under an f. a. s. contract to barges. In many cases I have known of cargoes of lumber that were sold under f. a. s. contracts to be delivered to barges. The custom of the trade, so far as I know, in October and November, 1916, where a contract was made for a named vessel to take delivery of a cargo in October/November/December, 1917, and where the vessel was found by both parties to be unable to [112—48] reach the loading port within the period October/November/December, 1917, was that you could take your lumber, and if you had to ship it in a specified time, if the vessel did not get there you got it out by some other carrier.

Cross-examination.

With regard to whether it is all a matter of contract, I was just speaking about general custom. That is my idea of the general custom, as I have just recited it. If the doing of it would create a custom, I would say that there is a general custom in regard to substituting another vessel for a named vessel, because it has frequently happened. That is just what I have seen done. If the contract uses the expression "f. a. s. mill wharf within reach of vessel's tackle," I do not think that there is a custom in the trade that requires under that contract the actual presence at the mill wharf of the named vessel. There is no custom, as I see, that would make it necessary for us, for instance, to put our vessel in

(Testimony of W. W. Payne.)

there. If I was making that kind of a contract, I would understand that I was agreeing with the mill to put the lumber in a certain position on the wharf. "F. a. s. ship's tackle" means that they could not put it back in the yard. That means they have to put it on the face of the wharf, where we could get it, say within 60 feet. It was the intention, of course, where the contract was for that kind of delivery to a named vessel, when the contract was made, to have the vessel there. That would be the custom. You would name the vessel so they would know the position of her. I would dispute that f. a. s. as applied to contracts where the vessel is named, and where the lumber is to be taken at the ship's tackle, requires the actual presence of the ship. I could not coincide with that view; it is contrary to my experience. My experience with reference to that kind of a contract has been that they would say, "Come along and take the lumber, there it is, get it yourself." That has been [113—49] my experience. I am telling you what I know has happened. Of course, if there is a technicality, and they are drawing up something and trying to name some specific vessel, there might be some specific reason for it. For instance, it might be a large vessel, a small vessel being named, and if you wanted to take in a big liner and wanted to take up all the space of the dock, then it might be the custom to have that vessel there.

Mr. McCLANAHAN.—Q. Mr. Payne, in f. a. s. contracts, where a vessel is named as the carrying

(Testimony of W. W. Payne.)

vessel, and there is also in the contract a definite number of feet of lumber named, followed by the expression "15 per cent more or less, to suit capacity of the vessel," it is not customary, under that kind of a contract, that the vessel shall be loaded to her capacity before ascertaining the amount of lumber sold?

A. The amount of lumber is ascertained piece by piece, as it goes on the ship, you understand.

WITNESS.—(Continuing.) When she is loaded, you know what the sale is for. I should say that it was an established custom. With regard to whether or not you could tell how much lumber had been sold under the custom, before you had finished loading the named vessel to suit her capacity, you could tell every night how much you had on the ship. When you have finished loading to capacity, then, and only then, can you tell how much is sold.

**Testimony of W. Leslie Comyn, for Plaintiffs
(Recalled—Cross-examination).**

W. LESLIE COMYN was recalled as a witness on behalf of the plaintiffs for further cross-examination, and having been previously duly sworn, testified as follows:

I have been engaged in the exporting of lumber since 1901. I am a manufacturer of lumber at this time. The name of my mill is the Dominion Mill Company. It is not running. It has been shut down about a week or ten days. I am familiar with the loading of [114—50] sailing vessels. I know that

(Testimony of W. Leslie Comyn.)

the carrying capacity of a sailing vessel varies. On some occasions she will load a slightly different amount of lumber from the amount she would load on other occasions. I have found that she will do that slightly, from my experience. "F. a. s." means free alongside on the face of the mill wharf, within a reasonable distance of the face to be taken on. It means right on the wharf itself. You could not deliver it alongside the mill. That is what it means on the face of the mill wharf. Free alongside mill wharf means alongside the mill wharf. It would be delivered alongside the mill wharf in the water, if a man wanted it that way and got his mill to do it. It also means on the mill wharf itself. When it means free alongside on mill wharf itself, the subject matter of the receiving means is the price. That is included in the price, delivered right on to the mill wharf. All free delivery is made on the price. The price is with free delivery. With regard to what object the delivery is to be made to when the lumber is put on the mill wharf, the free part of it is the price. It is free as to any additional charge, as coming out and being put on the mill wharf. That is free alongside the mill wharf, the face of the wharf. I have not stated that alongside meant in the water. You asked me if lumber could be delivered free alongside the mill wharf in the water, and I said yes, it could. "F. a. s." does not mean alongside in the water, unless you asked for it in the water." If you say, "f. a. s. water mill wharf," that you put after

(Testimony of W. Leslie Comyn.)

your "f. a. s." If you put "vessel," "ship," or "steamer," or anything you want to, after it, it is free alongside ship. You won't find a contract without something following f. a. s. When the contract is "f. a. s. vessel" it means that the delivery is to be made on the mill wharf, on the face of the mill wharf, so that the vessel can get it. It is customary to receive delivery on the mill wharf at the ship's tackle when the vessel is named and is at the mill. When they reserve the [115—51] right to make delivery on both sides of the vessels, from barges and from the mill wharf, the mill is not delivering to that ship. They are bringing it from some other mill. I have never had a mill reserve the right to make delivery to the ship from both sides of the vessel, from the mill wharf, and from barges in the water. The lumber is always delivered on the mill wharf, but if it came from a man who had more than one mill, I would say yes it might be done. I have known of mills reserving that right. I have known the selling agent for a number of mills to do that. That does not always mean that the seller of the lumber reserves to himself two methods of making delivery to the ship. When the seller of the lumber reserves the privilege of making delivery from both sides of the ship, one delivery from the mill wharf and one delivery from barges on the other side of the vessel, it means he could deliver them any way he wanted to. He could deliver by barges under those conditions if he wanted to, if that was in the contract. If it is in

(Testimony of W. Leslie Comyn.)

the contract, it reserves to the seller the right of making deliveries from either side from other mills. It means that it comes from another mill. He would not load that off his dock on to a lighter and bring it around to the other side of the ship, because he would simply be throwing away money; he would bring it from some other mill on a lighter. He has that privilege. If he reserves it, that would give it to him. It would give him the right to make a double delivery. There would be no objection whatever, provided the ship could handle it. The term "a. s. t." is a new one in the trade. As I understand it, they have had it in only since the Douglas Fir was put in. That is what they call "at ship's tackle," which is an unknown term in the trade. The clause "This price is for delivery f. o. b. mill wharf, Knappton, within reach of vessel's tackles, and/or on barges a. s. t. mill wharf" refers to the price. It most assuredly does. It says price. It is only a matter of price. It means that the [116—52] price is for delivery on mill wharf or on a barge, if they want to bring it by barges. It is to cover the cost of their barges. If they bring it along in barges they have to pay the cost of the barges.

Mr. McCLANAHAN.—Q. What I am getting at is this, the option which is given to the seller.

A. Provided they do not charge any more.

WITNESS.—(Continuing.) This is the option given to the seller, provided they make no additional charge. This is the option we have been

(Testimony of W. Leslie Comyn.)

talking about, which under the contract is given to the seller, but it provides it at the same price. I just want to make the point that it is the price. When this contract of November 2, 1916, was entered into, it was intended to be in place of and as a substitute for our purchase from the Charles Nelson Company. We released the Charles Nelson Company from the obligation and entered into this obligation with the Douglas Fir. The Charles Nelson Company contract has nothing to do with this except to show what was intended and what was not written into the second contract. The price of Douglas Fir set by the Douglas Fir Exploitation & Export Company at the time of the contract with us of November 2d was \$9.50. That is the price at which they put it in. I do not know that the market price paid was very much in excess of that. The market price set to others was \$10. They raised the price right afterwards. To the best of my knowledge and belief, it was only \$10. They might have raised it to \$10.50. It was either \$10 or \$10.50. They raised the price immediately afterwards, but in order to get us to take this contract over they lowered the price to \$9.50. When this contract of November 2d was entered into, it was our intention to load on the "Marston" and the "Talbot," two of the named vessels, the lumber purchased under the contract, provided they came along in time. It was also our intention to name later on two vessels [117—53] to carry the balance of the purchase. I believe that later on we named the

(Testimony of W. Leslie Comyn.)

“Golden Shore” and the “William Bowden.” I don’t remember when we named the “William Bowden.” I could not tell you the exact date when we found that the “W. H. Marston” would be unable to make her loading date. I named it this morning, with a letter probably in front of me.

Mr. McCLANAHAN.—You have not any recollection independently of the time when you found you could make the loading date?

A. I think it was some time in February, Mr. Baxter started this business of refusing to load the ship.

WITNESS.—(Continuing.) The date of her arrival in Melbourne was October 4th. It was quite apparent on the face of it, before October 4th, that she could not make her loading date. She had taken 96 days to go down. It was apparent in October. It was apparent in September. I do not know whether it was apparent earlier than that or not. Probably it was not given any attention until Mr. Baxter raised the question. The letter which you show me refreshes my memory with regard to the naming of the “Golden Shore.” One of my office staff wrote that letter. It was evidently done on the 28th of February, 1917.

Thereupon Defendant’s Exhibit “A” was admitted in evidence, and was in words and figures as follows:

(Testimony of W. Leslie Comyn.)

Defendant's Exhibit "A."

"San Francisco, February 28, 1917.

Douglas Fir Exploitation & Export Co.,
City.

Gentlemen:

Your Ref: B-572 Order #41.

Our Order #039.

We note from your favor of the 26th inst. that the above order, calling for 725 M feet, 15% more or less, will be supplied by the National Lumber & Manufacturing Co., Hoquiam, Wash., instead of by the Kleeb Lumber Co., and enclosed we are returning you an acceptance of the order.

This contract will be lifted by the schr. 'Golden Shore,' now on passage to Port Pirie and already due there." [118—54]

WITNESS.—(Continuing.) I could not say whether we obtained the information as to the position of the "Golden Shore" from the "Guide," or not. I would not do that. The manager of my South American Department would do it. My West Coast Manager could have obtained that information from the "Guide." If the "Guide" was still published and had not been stopped by the United States Government, anyone could obtain the information. The letter which you hand me with reference to the "Golden Shore," dated May 4, 1917, was written by our West Coast Department. It has every appearance of being the *pro forma* bill of lading for the "Golden Shore" referred to in the letter.

(Testimony of W. Leslie Comyn.)

Thereupon said letter was admitted in evidence and marked Defendant's Exhibit "B."

WITNESS.—(Continuing.) The paper which you hand me contains the signature of my concern at the bottom of the page. It is probably the specifications of the "Golden Shore." The specifications are dated May 23, 1917, and consist of three pages, the last of which is signed by Comyn, Mackall & Co., West Coast Department, H. A. Wilson.

Thereupon the said paper was admitted in evidence and marked Defendant's Exhibit "C."

WITNESS.—(Continuing.) I do not remember, with reference to the "Golden Shore," that there was a change in the November 2d contract, so as to bring the "Golden Shore" within an earlier loading period. Defendant's Exhibit "C," which purports to be the specifications, is on the form of the Douglas Fir Exploitation & Export Company. We undoubtedly furnished the specifications to them. So far as I [119—55] know, this is the copy of the specifications furnished by us. With reference to the "Talbot," we furnished specifications. I think you will admit the specifications were furnished for the "Talbot." We had to furnish specifications, or she would not have been loaded. To the best of my knowledge, the letter you show me is the one accompanying the specifications and those are the specifications.

Thereupon letter dated July 23, 1917, addressed to the Douglas Fir Exploitation & Export Company by the plaintiff, and enclosing said specifica-

(Testimony of W. Leslie Comyn.)

tions, was admitted in evidence and marked Defendant's Exhibit "D."

WITNESS.—(Continuing.) The specifications furnished for the "W. H. Talbot" called for 930,000 feet of lumber, while the contract contained the number 1,000,000. The explanation which I make of that is that the specification was made by the buyer in Australia, and not by us. Those specifications which appear on the letterhead of the Douglas Fir Company were furnished by the Douglas Fir Company to us. They were furnished by the buyer in Australia to us.

Mr. McCLANAHAN.—I would like to read, if your Honor please, one provision of the specifications just offered in evidence, as I want to base a question to the witness on it:

"This vessel should carry about 1000 M feet, and you are to load last, under no mark, 6x12, 10 to 40 feet merchantable to complete her cargo."

Q. I will ask you, Mr. Comyn, if that statement which I have just read does not appear on the specifications furnished to the seller by you?

WITNESS.—(Continuing.) The statement which you have just read appears on the specifications furnished to the seller by us. It is not our statement. It is the buyer's statement in Australia. We [120—56] represented the buyer, however. Our position in this case is that we purchased one parcel of lumber, and not four cargoes. We made no distinction between any of the vessels. The object of putting into the contract the name of any

(Testimony of W. Leslie Comyn.)

vessel was because Mr. Baxter put it in. We did not. The object of our consenting to its being put in was that it came written in that way, and my Australian Department passed it as it came in. I mean to say absolutely that Mr. Baxter originated the idea. I mean to say absolutely that the idea of 1,300,000 feet being for the "W. H. Marston" was originated by him from the Charles Nelson Company's letter, which you have before you and which is in evidence. Mr. Baxter also originated the provision that a million feet were for the "Talbot." It is in the Charles Nelson letter. We might have had a charter-party for these vessels at that time, and we might not. We did have a charter-party on the "Marston." Whether we had one on the "Talbot" or not I do not know. Subsequently I got a charter-party for the "Talbot," if it was not already chartered. But we stated in the letter that we probably would move the lumber by those two ships, in the letter to Charles Nelson. When Mr. Baxter wrote this letter, the name of the vessels was merely an incident. It coincided with my views then. It was merely an incident. When this letter was signed, initiating the contract, I was intending to use the "W. H. Marston" for a part of the purchase. We said that we would probably use that vessel, in our letter to the Charles Nelson Company. It also appears in the evidence that we did intend to use the "Talbot." We also intended to use the "Golden Shore" when we named her. We also intended to use the "William Bowden" when we

(Testimony of W. Leslie Comyn.)

named her. When the contract was made we intended to name two other vessels to carry the cargo. The object of putting into the contract "15 per cent more or less" was the custom. It is customary to put in 15 per cent more or less when you buy any quantity of lumber. When you [121—57] buy lumber, if you are buying 3,000,000 feet or 10,000,000 feet, you put in "15 per cent more or less." The idea is that we can take more or less, as we want. When we buy 10,000,000 feet of lumber, 15 per cent more or less gives us a great big leeway. It is customary to buy lots of lumber, definite blocks of lumber, and retain the option or privilege of taking delivery of 15 per cent more or less at the given price. That is customary, and that is what we always aim to do, because if the cargo goes down we do not have to take the 15 per cent, and if it goes up, we get the benefit of the 15 per cent. This is so irrespective of whether it is intended for a given vessel or not. That is one of the ways we sometimes make more money. It gives you a speculative contract with a leeway of 30 per cent. The object of putting into our contract "to suit the capacity of the vessel" is just what it states—to suit the capacity of the vessel. Practically it works out that the vessel is completely loaded. When it is completely loaded the contract is fulfilled. If the contract is for that particular vessel, it is fulfilled. Fifteen per cent more or less does not apply if the vessel is at the mill. If it is a contract for a particular vessel, the contract is fulfilled when the vessel is loaded, if the

(Testimony of W. Leslie Comyn.)

contract is to suit her capacity, irrespective of whether it is a given number of feet in the contract, if it is a contract for a cargo by the vessel. In this particular matter it was not the intention originally that this should be a cargo for the "W. H. Marston." I did not say just a little while ago that it was. The original intention was that we bought 3,500,000 feet, 15 per cent more or less.

Mr. McCLANAHAN.—Q. I mean when you signed this contract on November 2d, that was your intention then, to load that on the "W. H. Marston," to suit her capacity?

A. It was put in there by Mr. Baxter.

WITNESS.—(Continuing.) It was signed by my office. I have [122—58] said that the naming of the vessel in this contract was simply an incident. It is not an incident that the contract contains the provision for demurrage according to charter-party. It is absolutely an incident that the contract names the destination of the vessel, so far as the mill is concerned. The mill is not interested in that. It is an incident of that contract that the loading port is to be named in ample time to give the vessel instructions before leaving her next previous port of call. They have 90 or 100 days to do it in. That is an incident.

Mr. McCLANAHAN.—Q. Is it an incident that the conditions and terms of "G" list apply?

A. They do not always apply.

WITNESS.—(Continuing.) I do not think that they were ever considered outside of the price. I see

(Testimony of W. Leslie Comyn.)

in Plaintiffs' Exhibit No. 4, terms and conditions as per "G" list. That is not an incident. The terms are not. That is an important matter, as far as the price is concerned.

Mr. McCLANAHAN.—Q. Are the terms and conditions of "G" list for the benefit of both buyer and seller?

Mr. SUTRO.—I object to that as calling for a construction of the contract.

The COURT.—I think you are asking him for a construction of the contract, a question of law.

EXCEPTION No. 4.

WITNESS.—(Continuing.) It is certainly an advantage to the loading mill to know with measurable definiteness the time when they would be called upon to cut a cargo of lumber. The naming of an exporting vessel gives to the loading mill some measure of information on that subject. They can see where she is and follow her [123—59] movements. They can get information from the "Guide" or some such paper or from the buyer. We have sold f. a. s. cargoes as a manufacturer. We have found that when we extend our delivery dates over a period of, say, 90 days, it is helpful to us, as a manufacturer, to know by examining the "Guide" and such papers when the carrying vessel will probably require the lumber, because you will then be guided as to when you shall begin to cut your lumber. It is a matter that the mill likes to know. They might slip in another cargo in the meantime. We have done that before. When we

(Testimony of W. Leslie Comyn.)

found a vessel was going to be late, we have taken one out of order and put it in. It enables your mill to keep circulating right.

Mr. McCLANAHAN.—Q. When you were in the manufacturing business, was it not a custom known to the trade that the delivery of a cargo to a named vessel took place as soon as the cargo got into the slings or tackles of the exporting vessel?

A. They take it from the mill wharf.

Q. And as soon as they got it into their slings, then it belonged to the vessel?

A. It was at the buyer's risk after it left the mill wharf.

WITNESS.—(Continuing.) The custom is, when we charter a ship, the price you pay includes their getting stevedores and their loading the ship with the cargo. The mill company does not get the stevedores. The man who charters the ship does that. They buyer's price of the charter covers the cost of loading the cargo from the mill wharf on to the ship. The ship takes from the mill wharf, but the mill people pile it out on to the wharf. The stevedores are the servants of the buyer. The ship is the servant of the buyer. When I spoke of the buyer's price for the cost of taking the lumber off the wharf, I meant the buyer's price of the ship under the charter, not to the mill. The mill brings the lumber out so that the ship can get at it. In the sale of this particular cargo for the "W. H. [124—60] Marston" we furnished the specifications. The contract called for that, and we fur-

(Testimony of W. Leslie Comyn.)

nished them. To the best of my knowledge and belief, the letter of ours which you show me, dated September 19, 1917, which has already been introduced in evidence refers to the bills of lading and specifications for this cargo.

Thereupon the contents of said letter, consisting of the *pro forma* bills of lading and specifications so identified, were admitted in evidence and marked Defendant's Exhibit "E," and were in words and figures as follows:

Defendants' Exhibit "E."

"Enclosed we beg to hand you specifications for this vessel, which we trust you will find in order.

You will note that the vessel is to be despatched to Melbourne, and we will require the following documents:

BILLS OF LADING—Two originals and three non-negotiable copies covering each mark as per *pro forma* herewith."

WITNESS.—(Continuing.) At the time that that letter was written I had not of my own knowledge found that the "Marston" would not be able to make her loading date. I did not know as to that, because I was not dealing with it. My Australian Department was dealing with that. The fact that my Australian Department wrote that letter would indicate that the question had not come up between them and Mr. Baxter. It was then that Mr. Baxter for the first time in his experience, or in my dealings with him in twenty years, raised

(Testimony of W. Leslie Comyn.)

the question about the inability of the "W. H. Marston" to make December loading. This suit was the result of that. We decided to take this lumber on barges immediately after he refused to deliver it to the ship. He most assuredly refused to deliver it to the "Marston." He did so when he said that she could not arrive in time. I do not mean that he refused to extend her loading date. I mean that he said he would not deliver that lumber to the "Marston" if she arrived there after December 31st, and when he said it he [125—61] knew she could not arrive there by December 31st. He refused verbally to deliver the lumber to the "Marston."

Mr. McCLANAHAN.—Q. Mr. Comyn, you said this morning that Mr. Baxter had refused, or that he did at that time refuse, to deliver lumber to the "Marston." You meant by that that he refused to deliver it except the "Marston" came within the loading date?

Mr. SUTRO.—That is our contention.

Mr. McCLANAHAN.—Q. Is that what you meant?

A. That is very obvious.

WITNESS.—(Continuing.) That is what I meant. We had a purchaser for the lumber at that time. The cargo was sold. I could not give you the exact date, but I could look it up and advise you. It was sold to our buyers, Rosenfeldt & Co. When we sent the defendant the contract of November 2d we wrote them this letter on November 6.

(Testimony of W. Leslie Comyn.)

My Australian Department wrote that. It is signed by Claude Daly. Mr. Daly was one of my men at that time. His position was Manager of our Australian Department. He was a man in authority. The paper which you show me is apparently a copy of a letter from the Douglas Fir.

Thereupon Defendant's Exhibit "F" was admitted in evidence and was in words and figures as follows:

Defendant's Exhibit "F."

"November Sixth, 1916.

Douglas Fir Exploitation & Export Co.,

260 California Street,

San Francisco, California.

Dear Sirs:

We have to acknowledge receipt of your sale note covering 3500 M' 15% more or less October to December, 1917. We now take pleasure in approving same as per enclosed. It is understood that the vessels named in your sale note are not to load above the bridges on the Columbia River, and with regard to the balance of the purchase, it is understood that the same cannot, under any circumstances, be shipped from the Portland Lumber Company. We have also very great prejudice against shipping from the Inman Poulsen, Clark & Wilson and Peninsula Mills, and would much appreciate your not [126—62] stemming us with those mills. We presume also that you would have no objection if it was found convenient, to our sub-

(Testimony of W. Leslie Comyn.)

stituting other vessels in place of the 'Marston' or the 'Talbot.'

Very truly yours,
COMYN, MACKALL & CO.,
Per CLAUDE DALY."

WITNESS.—(Continuing.) That refers to the contract of November 2d.

Thereupon Defendant's Exhibit "G" was admitted in evidence, and was in words and figures as follows:

Defendant's Exhibit "G."

"November 8, 1916.

Messrs. Comyn, Mackall & Co.,
310 California St.,
San Francisco, California.

Gentlemen:—

We acknowledge yours of the 6th and confirm your understanding than none of these vessels will be required to load above the bridges at Portland which, in itself, would exclude the Portland Lumber Company; but we will also agree that none of them are to load at the mill at Portland.

The other mills mentioned by you—Inman Poulsen, Clark & Wilson and Peninsula Lumber Company—are not interested in our company, but if they should later come into the company, Inman Poulsen would still be excluded on account of being above the bridges. This then would leave only Clark & Wilson and the Peninsula Mills as possibilities and we would prefer to keep them in that

(Testimony of W. Leslie Comyn.)

position, as it might be very necessary for us to load one of your vessels at one of these mills.

As regards substituting other vessels for 'Marston' and the 'Talbot': As these vessels are now matters of record in the contract, we would prefer not to have any agreement giving you the option of naming other vessels. If, however, you have now or will have at any future time other vessels in like position and for your convenience wish to substitute them for either one or both of these vessels, we will be pleased to go into the matter with you with a view of meeting your necessities.

Very truly yours,

DOUGLAS FIR EXPLOITATION & EXPORT CO.

By _____,
General Manager."

WITNESS.—(Continuing.) I think it is very likely that after the receipt of the letter of November 8th we had vessels in like position to the "W. H. Marston." We had some 50 or 60 vessels under charter. What was the use of our taking up with Mr. Baxter the question of substituting another vessel in like position? I cannot say that we ever did, whether our Australian Department did it or not, but I should say that they did and were turned down. [127—63]

Mr. McCLANAHAN.—Q. Answer the question: You had accepted the contract of November 2d when on December 15th Mr. Baxter sent you the acknowledgment of contract?

(Testimony of W. Leslie Comyn.)

A. The acknowledgments were accepted.

WITNESS. — (Continuing.) The acknowledgments were accepted. They were all final contracts. The acknowledgment dated December 15th was not made by us with full knowledge that we could not substitute another vessel as the receiving medium for this lumber. We always substituted other vessels prior to that time. I do not think it ever occurred to me when I signed the contract dated December 15th, that we could not in this case substitute a vessel for the "W. H. Marston." I had not forgotten about the letter of November 8th. That had never occurred to me before. We always substitute vessels. I had not forgotten Mr. Baxter had refused to substitute in this case. I did not know that letter had been written, personally.

Mr. SUTRO.—Q. Mr. McClanahan, yesterday you asked for the specifications; here they are.

Mr. McCLANAHAN.—Yes. And I asked for the invoice of the "Marston" cargo, also for the specifications and also for the date of loading.

Mr. SUTRO.—I think you will find it all right here. The date of loading is shown on the invoice. It was, I think, May 17, 1918. That is close enough anyhow, the middle of May.

WITNESS.—(Continuing.) The *pro forma* bills of lading furnished by us to the defendant were left blank as to the number of specification pieces, because you cannot tell how many pieces are going into the cargo until the cargo is cut. You can tell approximately the number of specification pieces

(Testimony of W. Leslie Comyn.)

intended for the cargo of a named vessel before the cargo is actually loaded. We did not approximate the number of the *pro forma* bills of lading, because they would be different sizes. There would be different sizes and [128—64] number of pieces. We did not approximate it, because a mill cuts different sizes. They measure up every day, and they can tell approximately when they have 1,300,000 feet, how many pieces they have. The bill of lading is a matter with which the mill has nothing to do, except as an accommodation to the buyer. It is no part of their contract.

Mr. McCLANAHAN.—Q. Here you have furnished to the seller a specification with the different kinds of lumber that the order is for, but you have left blank the number of pieces, while at the same [129—64a] time you have sent in a specification that gives the number of pieces; now, I ask you why it was that in the specification you named the number of pieces, and in the *pro forma* bill of lading you left the number of pieces blank? Isn't it because you could not know until the vessel was actually loaded with this specification lumber, how many of the different pieces would have to be inserted in the bill of lading?

A. Exactly, but the mill does not have to do that; our agent can insert that in the bill of lading. We don't have to send that bill of lading to the mill.

Q. And that is the reason, is it not, you could not tell until the vessel is actually loaded how many

(Testimony of W. Leslie Comyn.)

pieces of specification lumber would appear in the bill of lading?

A. No, not until the vessel is loaded.

WITNESS.—(Continuing.) We ordered sufficient barges to take 1,300,000 feet. I have no personal knowledge that only one barge was sent there. I know we were prepared to send barges to take 1,300,000 feet if we could get the lumber.

Mr. McCLANAHAN.—Q. I grant that. I simply wanted to correct what I thought was an error in your statement when you said that barges were at the mill dock to receive this lumber, when there was but one barge; you know that, don't you?

A. All I know is that arrangements were made for sufficient barges to take 1,300,000 feet of lumber from that mill.

WITNESS.—(Continuing.) I do not know of my own knowledge that only one barge went there. I do not know how many were sent. I know that we made arrangements to send enough to take that lumber. It might have been one, or it might have been three. At the time that this one barge or a number of barges were arranged for, we did not know that the Douglas Fir had declined to deliver to barges. We did not know that they would decline to deliver to barges. There [130—65] was no telling that they would decline when we sent the barges to the mill. We certainly expected to get that lumber.

Mr. McCLANAHAN.—Q. Now, I ask you if you did not know, when you went to the expense of send-

(Testimony of W. Leslie Comyn.)

ing this barge there, that the defendant had already denied you the right of taking delivery on a barge?

A. There was every reason to believe they would change their minds.

WITNESS.—(Continuing.) Yes, we had such a letter in our possession. We took the chance of their changing their minds, and we sent the barges. That expenditure represents \$304. I remember my testimony to the effect that the difference between the contract price of the lumber and the purchase price from Dant & Russell was \$17,511 on a sale of 1,300,000 feet. I did not do this figuring. It was done with a pencil and paper by Mr. J. Claude Daly, the gentleman whose name appears on the contracts in suit here. He figured out the cost of our order to the Douglas Fir at \$9.50 "G" base, by figuring the average price of the specification. Undoubtedly he took the specification. Undoubtedly he would have to do that, and I should say that he undoubtedly applied to the several lengths, breadths and sizes of the specifications the appropriate price based on the "G" base price of \$9.50. Those different pieces and lengths, breadths and sizes of specification lumber bore different prices. The \$9.50 was figured as the base price per thousand for the 1300 M feet.

Mr. McCLANAHAN.—Q. But that was not the price that was figured as the cost of that invoice? You did not multiply 1300 M by \$9.50?

A. The specifications are the same in either event; it doesn't make any difference whether you

(Testimony of W. Leslie Comyn.)

take \$22.50 base or a \$9.50 base, the extras are the same.

WITNESS.—(Continuing.) The \$9.50 base price was the base price only. There were practically no deductions from that. They were [131—66] all additions. We bought the cargo from Dant & Russell shortly after this figuring was done. The contract states the date, I think. It might have been December 7, 1917, or a day or two before that that we bought the lumber, and then the contract was sent up. At that time, on December 7, 1917, we did not know in the lengths, breadths and sizes the number of specification pieces of lumber that could be loaded on the "W. H. Marston." You take the specifications, 1,300,000 feet. My answer is no, not exactly.

The COURT.—I suppose this figuring or estimate or whatever it is was based on the specifications that had been furnished to the defendant by the plaintiff along in September or October or whatever it was.

Mr. McCLANAHAN.—Yes, your Honor.

Mr. McCLANAHAN.—Q. So that this figuring that was done by Mr. Daly, by which you ascertained the difference between the price of \$9.50 and \$22.50, was figured without any reference to the capacity of the "W. H. Marston"?

A. It may not have been figured until after the "Marston" was loaded with that cargo; that I cannot say; it might have been figured before; it might have been figured after.

(Testimony of W. Leslie Comyn.)

WITNESS.—(Continuing.) If it was figured before, it was figured without knowing exactly what she would carry. If it was figured afterwards it was figured exactly on what she did carry. I do not know, as a matter of fact, whether it was figured before the “Marston” was loaded. I do not know that this case was filed December 27, 1917. If that is the case, then it was figured before.

Mr. McCLANAHAN.—Q. And without any reference to the actual carrying capacity of the “Marston”?

A. The “Marston” was not finished loading until May.

Q. And this figuring was done without any reference to the actual carrying capacity of the “Marston”? [132—67]

A. It was figured on the specifications we received.

WITNESS.—(Continuing.) It was simply figured on the specifications, which figured up 1300 M feet.

Mr. McCLANAHAN.—Q. If the “Marston” had been loaded within the contract date, if she had arrived here and had been loaded within the contract date, before the 31st of December, the invoice which would have been made and rendered for that cargo would have been based on what was loaded on the “Marston,” would it not?

A. On the barges.

(Testimony of W. Leslie Comyn.)

WITNESS.—(Continuing.) Assuming that the “Marston” arrived and that she got in here in December and went to the mill to load, it is absolutely true that after she had loaded, the invoice would have been based on what she carried. That is the way the “Marston” was handled when she was loaded at the Dant & Russell mill. We paid for what she carried. That was the way the cargo that the “Talbot” carried was figured. I know that it was more than 1300 M feet. It was 1314 M feet; it was 14,000 more than 1300 M. I saw the figures this morning on that invoice. I have chartered a great many vessels. When I charter a vessel, one of the necessary items that I must know is approximately how much she will carry. When I chartered the “W. H. Marston” from J. J. Moore & Co., I knew approximately what she would carry. We have the approximate carrying capacity of every vessel owned on the Pacific Coast. When we put into this contract 1300 M feet, that was what we had approximated to be her carrying capacity. This 15 per cent more or less was a leeway to be used in the loading of the ship.

Mr. McCLANAHAN.—Q. Now, Mr. Comyn, if our construction of this contract is correct, namely, that this was a purchase of a cargo for the “W. H. Marston,” will you not admit that it would be impossible to load that cargo for the “W. H. Marston” on to barges if the cargo was to suit the capacity of the “W. H. Marston”? [133—68]

A. If 1300 M had been put on barges, the “Mars-

(Testimony of W. Leslie Comyn.)

ton" would have gone to sea with the 1300 M and it would have constituted a full and complete cargo for the "Marston."

WITNESS.—(Continuing.) We are the judge of what constitutes a full and complete cargo for our ships. A cargo for a ship is such a cargo as a charterer chooses to put on. It is not necessarily [134—68a] a full shipload. The charterer has the right under the charter-party to pay dead freight. If a charterer chose to send the "Marston" out 14,000 feet shy we could have paid the dead freight, and it would have been a full and complete cargo for the "Marston." If we wanted to put on a full cargo on the "Marston," a cargo to suit her capacity, I consider that we could load that on barges in the specification lengths, breadths and sizes. We knew sufficiently close to the actual capacity of the "Marston" to put the cargo on barges to give that ship a full cargo, running the slight risk of paying possible dead freight, but with very little chance of dead freight, because our estimate is so close. It was within 14,000 feet. It turned out to be close. We paid for the "Talbot" cargo the amount of lumber that she actually carried. The reason why the "William Bowden," our fourth ship, was not loaded, was because we could not get barges to put to the mill. If we could have got barges, we would have put barges alongside the mill and had that lumber. The "Bowden" had not arrived here between October and December. We could not get the cargo. We could not get barges to the side of

(Testimony of W. Leslie Comyn.)

the mill to take the lumber. If we could, we would have got the barges, and that case would have been here, too. The "G" list prices are not necessarily based upon delivery to sailing vessels. The "G" list itself says so, but it never has been the custom in the trade. You could deliver to anything you want on all sales made on the "G" list at that time. If the seller in this contract is given the right to make delivery of the cargo on barges at the ship's tackle mill wharf, that does not necessarily require the actual presence there of the vessel. He could exercise his right to deliver on barges at the ship's tackle mill wharf, without the vessel being there, by putting it on barges. He could take it from his barge and put it on ours. That would be absolutely a delivery at ship's tackle. Our stevedores would take it off their barge, [135—69] and put it on our barge. That would be a delivery at ship's tackle. It would be ship's side, ship's tackle. With regard to this offer that I say was made to the defendant of \$2,500, if it would extend the loading date of the "W. H. Marston," J. J. Moore & Co. applied to us, to the best of my recollection and belief, to be allowed to bring a cargo of wheat up in that ship, and we told them to take up their negotiation with Mr. Baxter, as we could not negotiate with them. The man that I talked to was, I believe, Mr. Blair, the manager of J. J. Moore & Co. I only know that he made them an offer with our consent. I simply heard through my Australian Department that the negotiation was

(Testimony of W. Leslie Comyn.)

going on; that Mr. Blair had made the Douglas Fir an offer, I do not know whether it was \$2,500 or not.

Mr. McCLANAHAN.—Q. Yesterday you said \$2,500.

A. There was something in the correspondence which showed that \$2,500 had been offered. No, you made the statement that we had offered \$2,500. We didn't offer \$2,500. You made that statement.

WITNESS.—(Continuing.) It is my understanding that J. J. Moore & Co. offered the defendant \$2,500 if they would extend the "Marston" loading date. My understanding is that the offer was made by J. B. Blair of J. J. Moore & Co. to Mr. A. A. Baxter of the defendant company, and that my concern had nothing to do with that offer; and I got that understanding from Mr. Daly. It did not make any difference to us whether the "W. H. Marston" returned from Melbourne to this Coast in ballast, or whether she carried a cargo, although we got \$5,000 for that privilege. It made no difference to us after you had refused to give us the lumber. At that time the lumber was going to be loaded on the "Marston" when she came along, as it has been customary for vessels to be loaded. I doubt whether the carrying of the cargo delayed the "Marston." There was a consideration for the payment of the \$5,000, for she carried a cargo of wheat instead of coming up in ballast.

[136—70]

(Testimony of W. Leslie Comyn.)

At the time we purchased this cargo from the defendant we did not have a buyer for it.

Mr. McCLANAHAN.—Q. When did you secure a buyer for this cargo?

Mr. SUTRO.—I object to that as utterly immaterial. It is merely to save time and to put some limit on this cross-examination that I am objecting. He bought this lumber and didn't get it. The question is whether there was a breach of contract, and whether they are liable for the damages. What difference does it make whether he sold it or whether he put it in the ocean, or what he did with it. I object to this as immaterial.

The COURT.—My judgment is that under the pleadings in this case the objection is well taken. The question is simply whether this contract has been breached, and if so, the measure of damages would be the difference between the contract price and the market value at the time of the breach. It is not a matter of any concern what the plaintiff did or intended to do with the lumber.

To which ruling the said defendant duly excepted and now assigns the same as error.

EXCEPTION No. 5.

Mr. McCLANAHAN.—May I ask one or two preliminary questions, your Honor, in order to save my exception?

The COURT.—All right.

Mr. McCLANAHAN.—Q. Was the contract with your buyers in Australia not made before October, 1917?

(Testimony of W. Leslie Comyn.)

Mr. SUTRO.—The same objection.

The COURT.—The same ruling.

To which ruling the said defendant duly excepted and now assigns the same as error.

EXCEPTION No. 6.

Mr. McCLANAHAN.—We save an exception.
[137—71]

Q. Was this lumber that was loaded on to the “Marston” by Dant & Russell not used in the fulfillment of the contract which had been made prior to October, 1917?

Mr. SUTRO.—The same objection.

The COURT.—The same ruling.

To which ruling the said defendant duly excepted and now assigns the same as error.

EXCEPTION No. 7.

Mr. McCLANAHAN.—Exception.

Q. Did you not suffer no loss in the fulfillment of that contract by the lumber loaded on to the “Marston” by Dant & Russell?

Mr. SUTRO.—The same objection.

The COURT.—The same ruling.

To which ruling the said defendant duly excepted and now assigns the same as error.

EXCEPTION No. 8.

Redirect Examination.

It is a matter of value to the mill to know the whereabouts of a vessel that is named in the contract, under circumstances where they are going to load the vessel, whether she arrives within the con-

(Testimony of W. Leslie Comyn.)

tract period or a little after. If the time for the delivery of the lumber is specified, and the seller takes the position that delivery must be made within that time, then the seller does not need to know it. They know when they have to get the cargo ready.

MR. SUTRO.—I would like to offer that letter in evidence. It is dated August 17, 1917. It relates to the "Bowden."

Q. That was one of the named vessels, one that was subsequently named? A. It was.

Q. For one of those four cargoes? [138—72]

A. Yes, for one of those four cargoes.

Thereupon Plaintiffs' Exhibit No. 24 was admitted in evidence and was in words and figures as follows:

Plaintiffs' Exhibit No. 24.

"San Francisco, August 17, 1917.

Messrs. Comyn, Mackall & Co.,

310 California Street,

San Francisco.

Gentlemen:

'WILLIAM BOWDEN.'

We acknowledge your favor of the 16th inst., with specification [139—72-a] for this cargo, and accept the vessel conditioned on her making the loading date provided in the contract, and with the further understanding that as the original contract, dated November 2, 1916, provides for two vessels to be named with a joint capacity of 1450 M, which is interpreted to mean, as usual, 1450 M, 15 per cent more or less, and as you have already named the

(Testimony of W. Leslie Comyn.)

'Golden Shore' for one cargo and now name the 'Bowden' for a second cargo, which vessels combined will probably carry more than the maximum amount of the contract, that you will pay us for all such excess carried by these two vessels over and above the 1450 M plus 15 per cent, at the present market price, namely, \$20 base 'G' list, less 2½% and 2½% for cash.

Please send us the charter-party, in duplicate, for the 'William Bowden.'

Written in duplicate—please approve and return one copy for our files.

Very truly yours,

DOUGLAS FIR EXPLOITATION & EXPORT CO.

By A. A. BAXTER,
General Manager.

AAB-L.

Approved:"

WITNESS.—(Continuing.) As I understand it, that letter was approved. I could not say offhand whether we loaded the "Golden Shore." I would have to see the document. I could tell you if I saw the document. We did not load the "Bowden." I think we loaded the "Golden Shore." She did not carry more than 1450 M feet and 15 per cent more. She carried 725 M feet, 15% more or less. She did not carry in excess of 725 M plus 15 per cent. It is a fact that the specifications cover the obligation of the mill in respect to the lumber to be de-

(Testimony of W. Leslie Comyn.)

livered. I stated that the "Marston" was loaded within approximately 14,000 feet of 1,300,000. That would be approximately one per cent. In figuring the price you take your invoice, say, for instance, of the "Marston," 1314 M feet base. With regard to your first $2\frac{1}{2}$ per cent, you have to make up your invoice before you deal with it. Assuming that the base is \$9.50 you have to add your extras first, and then deduct your first $2\frac{1}{2}$ per cent from that amount for that invoice, and then deduct your second $2\frac{1}{2}$ per cent.

Mr. SUTRO.—Q. Now, Mr. Comyn, if you will assume, just to oblige me for a moment, that the price was \$9.50 on 1,300,000, that would give you \$12,350; now, just assume for a moment that that was [140—73] the actual price, you would deduct $2\frac{1}{2}$ per cent of that, wouldn't you? A. Yes.

WITNESS.—(Continuing.) That would be \$308.15, which would leave you \$12,041. Then you deduct $2\frac{1}{2}$ per cent from that, and that gives you \$301, or a difference of \$11,740. Assuming that you figured 1,300,000 feet at \$22.50, that would give you a figure of \$29,250. In estimating your damages, the difference between the two would be, if those were the correct figures, \$17,511, the amount we are suing for. One is a net rate, though. That is the amount we are suing for here.

Recross-examination.

To the best of my knowledge and belief, that is the way the bill was figured.

(Testimony of W. Leslie Comyn.)

Mr. McCLANAHAN.—Q. Don't you recognize, Mr. Comyn, that that is directly opposite to what you testified on cross-examination? You said on cross-examination, in substance, that the base "G" list price was \$9.50, and that that was used as a base price to which was added an additional price to suit the different sizes of the lumber: Isn't that true?

A. He just read the invoice.

WITNESS.—(Continuing.) Mr. Sutro was absolutely correct when he multiplied 1314 M by \$9.50. Then you add the difference that goes to the different sizes and lengths and breadths of the lumber.

The COURT.—It would probably make the damages larger, wouldn't it?

Mr. McCLANAHAN.—It would make them very much larger.

The COURT.—I think I understand the situation. But your theory would make the plaintiff's damages much larger?

Mr. McCLANAHAN.—Yes.

Mr. SUTRO.—Yes, much larger. We took the minimum damages. I want to ask the witness one more question.

Q. You were asked by Mr. McClanahan why you did not avail yourself [141—74] of the offer that Mr. Baxter made in this letter, that in case you wanted to substitute another vessel he would take up the matter to suit—what did he say, what was his language? Let me get the letter. Mr. Baxter said that he would be pleased to go into the matter with a view to meeting your necessities in case you found

(Testimony of W. Leslie Comyn.)

it necessary or desired to substitute another vessel. That letter was written November 8, 1916. Now, in September, 1917, when you discovered that the "Marston" could not make her loading date, why did you not ask Mr. Baxter to substitute some other vessel?

A. Because Mr. Baxter, when we leased the Dominion Mill in June, of 1916—

Q. Was it 1916?

A. In June of 1917, he stated that he would do no more business with us, and would endeavor to put us out of business.

Q. Did Mr. Baxter offer to substitute any other vessel for you? A. He did not.

Q. Did Mr. Baxter, in 1917, so far as you know, ever offer to meet your necessities with reference to the "Marston"? A. Just the reverse.

Q. He refused to deliver unless you purchased on his terms? A. He refused to sell us.

At this point plaintiffs rested their case in chief.

Mr. McCLANAHAN.—Now, if your Honor please, at this time I will make a motion for a nonsuit. I understand the Court will not pass on it now.

The COURT.—No, I will not pass on it now.

Mr. McCLANAHAN.—We move for a nonsuit on the following grounds:

First: The record shows and the proof is, that it would be impossible to make delivery of a cargo of Douglas Fir, in accordance with the requisite specification lengths, breadths and sizes, to [142—75]

suit the capacity of the schooner "W. H. Marston," where such delivery is to be made to barges, or any other receiving medium (other than the vessel herself), unless such capacity was known, and that such capacity was not known.

Second: The record shows and the proof is that it would be impossible to determine the invoice value of a cargo of Douglas Fir to suit the capacity of the schooner "W. H. Marston" in the required specification lengths, breadths and sizes, where delivery is to be made to any other receiving medium, unless such capacity was known, and that such capacity was not known.

Third: The record and plaintiffs' proof fails to show that the lumber purchased December 7, 1917, at \$22.50 net Base "G" List was of such lengths, breadths and sizes as would constitute a cargo "to suit the capacity" of the schooner "W. H. Marston."

Fourth: The record and plaintiffs' proof fails to show the number of feet, of the several lengths, breadths and sizes of (the specification) lumber for a cargo to suit the capacity of the schooner "W. H. Marston," and therefore the proof furnishes no basis for applying to the various sizes, the "G" list base sale price of \$9.50, or the "G" list base purchasing price of \$22.50.

Fifth: The records show and the proof is, that the contract gives defendant the option of making a delivery either on the mill wharf, within reach of vessel's tackles, or on barges, at ship's tackles, mill

wharf; or on both mill wharf and barges at ship's tackles.

As to one of these optional places of delivery, plaintiffs' sworn complaint alleges, defendant's answer admits, and the proof shows, that the phrase of the contract "on barges a. s. t. mill wharf," means and was understood by both parties to mean "on barges, at ship's tackles, mill wharf." There is no evidence that defendant ever waived its option to deliver "on barges at ship's [143—76] tackles mill wharf," and the inference is conclusive that in order to make such a delivery a vessel must be actually present at the mill wharf, and there is no evidence that the "W. H. Marston" or any other vessel was there.

Sixth: The record shows and the proof is, that the plaintiffs failed to have the schooner "W. H. Marston" present at the mill wharf of the Knappton Mill & Lumber Co. on the Columbia River, the agreed loading place, at any time between Oct. 1st, 1917, and December 31, 1917, inclusive, and therefore plaintiffs failed to perform a condition precedent to a delivery by the defendant between those dates, of a cargo to suit the capacity of that vessel.

Seventh: The record, the proof, and the applicable law shows and is, that the sale in suit was one for a cargo and not a definite number of feet of lumber, and that such cargo was one to suit the capacity of the schooner "W. H. Marston." And I have here in my written motion recited, for the Court's convenience, a number of cases.

Nor is there any evidence that said schooner's capacity was known or that said schooner was present at the agreed loading place at any time within the agreed delivery dates, so that the capacity might have been ascertained.

Eighth: The record shows and the proof is, that the naming of a vessel to receive delivery of the cargo of lumber sold, was for the benefit of defendant, for the reason, *inter alia*, that it gave to defendant a means of ascertaining, with some measure of accuracy, the time between October 1st and December 31st, 1917, at which it would be called upon to cut and furnish the specification lumber, and that this benefit was never waived by defendant and could not, as matter of law, be waived by the plaintiffs.

Ninth: The record shows and the proof is, that the naming of the schooner "W. H. Marston" to receive delivery of the cargo of [144—77] lumber sold, was for the benefit of defendant, for the reason, *inter alia*, that such a delivery was a guarantee and an assurance to defendant that the lumber would be exported and the sale therefore was such as was within the power of defendant to make.

Tenth: The record shows and the proof is, that a delivery to a barge such as was demanded by plaintiffs, or to any medium other than a vessel, is not a delivery to a ship for export shipment. (Requirement of "G" List.)

Eleventh: The record shows and the proof is, that the price of \$9.50 Base "G" List was a price for delivery to an exporting vessel ("G" List so provides),

and there was no such vessel present within the agreed loading period at the agreed loading price.

Twelfth: The contract on its face shows, that the time of delivery was such time, within the limit of October 1st, 1917, and December 31st, 1917, as would be determined by the arrival at the agreed loading port of the agreed carrying vessel, the schooner "W. H. Marston."

Thirteenth: The record shows and the proof is, that the failure to have the "W. H. Marston" present at the agreed loading port within the agreed time, effects the subject matter of the contract, the character of the commodity sold, the time of delivery, and the place of delivery and was a condition precedent to performance by the defendant.

Fourteenth: The record shows that the present case was prematurely brought in that the delivery date named in the contract did not expire until December 31st, 1917, and the complaint was filed December 27th, 1917.

Fifteenth: That the evidence adduced by the plaintiffs is not sufficient to support a judgment.

The Court subsequently denied defendant's said motion for [145—78] a nonsuit.

To which ruling the said defendant duly excepted and now assigns the same as error.

EXCEPTION No. 9. [146—79]

Deposition of E. G. Griggs, for Defendant.

Thereupon the deposition of E. G. GRIGGS, a witness called on behalf of defendant, was offered and admitted in evidence, but was not read to the Court.

Direct Examination.

My business is that of President of the St. Paul & Tacoma Lumber Company. Our plant is located on Puget Sound at Tacoma. I have been connected with the St. Paul & Tacoma Lumber Company about 28 years. Their business is the manufacture of lumber and all the products in connection therewith. We ship by rail, coastwise, export and local. We have done an export business ever since the organization of the company. I have been connected with the company since 1891. It was organized in 1888-89. I have been president of it for ten years, I think. I had some slight experience in the Beaver Lumber Company in Wisconsin, before I came West. In the export business of my company, I have had something to do with the export in cargo lots of lumber. The export is in both cargo lots and lot shipments, but cargo lots is largely our business. By cargo I mean vessel and steamer cargoes. By a cargo I mean a sailing vessel that loads complete with a lumber cargo, or a steamer likewise. I am familiar with the trade terms used in the export business of lumber in cargo lots. I am familiar with the expression "f. a. s." In cargo lot sales f. a. s. there is a custom touching the question of the place of

(Deposition of E. G. Griggs.)

delivery. "F. a. s." means "free alongside vessel at ship's tackle" with reference to the mill that is making the sale. The custom of the business is to deliver the lumber free alongside ship, within reach of the vessel's tackle. I have never known of any other custom and I have been in the business for thirty years. There is a custom known to the trade in "f. a. s." sales where there is a definite number of feet named in the contract, coupled with the expression "15% more or less to suit capacity of vessel," [147—80] touching the manner of ascertaining the amount of lumber in that cargo. The 15% allowed to suit capacity of the vessel is determined as you load the vessel. You are delivering the lumber and you are supposed to vary 15% on the amount of lumber furnished to suit the requirements of the vessel as she is loaded. If for any reason the vessel tonnage is calculated a little differently than the cargo would stow, and the way she was trimmed with the ballast would determine, and she would take 15% more, the mill would have to furnish the lumber. If she would not carry quite the deckload, or carry quite the capacity of her rated tonnage would figure, she would carry 15% less, or such percentage as would load the vessel. Such contracts are common to the trade where there is a definite number of feet coupled in the contract with the expression "15% more or less to suit capacity of vessel." I am familiar with the way such contracts are generally made. In such contracts under this custom as I have testified to, the

(Deposition of E. G. Griggs.)

method pursued in determining the amount of the cargo sold is to furnish the vessel cargo and load to capacity as required by the master, furnishing the 15% if this is required. I should say that it would be impossible to determine the exact amount of cargo sold under the contract prior to the actual loading of the vessel. The master of the vessel is governed by the marine surveyor in determining how much he can take. There is a Board Surveyor, generally, that issues a certificate as to the vessel's condition to take the cargo, and he also determines how high he should go with the deckload, or what the amount of the cargo should be, depending on the seaworthiness; a United States Marine Surveyor. I think the judgment of the master is governed by this marine surveyor's judgment, and I do not know whether he can go to sea in this country in defiance of the marine surveyor or not. But he is generally governed by the marine surveyor. There is practically [148—81] no difference between the terms "f. a. s. mill wharf" and "f. o. b. mill wharf within reach of vessel's tackles" or "on barges mill wharf at ship's tackles." I know of the expressions "at ship's tackle" or "within reach of ship's tackles." Such expressions in an export contract are for the benefit of both the seller and the buyer. Such an expression is for the benefit of the seller in that it determines where you can deliver the lumber on your wharf, within say, two lengths of the side of the vessel, on your wharf. And if, for any reason, your wharf

(Deposition of E. G. Griggs.)

is occupied with some lumber, you could then deliver it in a lighter alongside the vessel within reach of the ship's tackle. That would give you the benefit of two deliveries, and also give you the benefit of bringing lumber from other sources than the one mill, and is a decided advantage in furnishing cargo. The benefit to the seller in making or providing two places of delivery to the ship is that if any one cuts lumber ahead and has it on his wharf, to provide against demurrage that is generally applicable on all charters, he can also deliver on lighters alongside the ship and expedite delivery and save the re-handling of a great deal of lumber and put it all within reach of ship's tackle. The expense would be considerable to him if he had to rehandle lumber. It is an advantage to the mill to expedite the delivery of the lumber. Sometimes it is very necessary. It is an advantage if the vessel is on demurrage and you want to expedite the loading of the vessel, you can deliver them both ways and work different hatches and increase the loading of the vessel so that you can save considerable trouble and demurrage. Another advantage, I think, I have mentioned is that in handling cargo the deliveries in both ways was an advantage. You can bring lumber from other mills if you are tied up with your mill, by reason of your demurrage, you can bring lumber from other mills and put it alongside in lighters and very quickly expedite [149—82] the loading and delivery of the cargo and save yourself demurrage. The space on a loading wharf is

(Deposition of E. G. Griggs.)

vital to a cargo man. Delivery at the mill wharf from alongside is more advantageous to the mill than delivering to the lighter. The only benefit of a lighter would be if the purchaser paid the expense of loading the lighter, and also handles the lumber from the lighter to the vessel when she is delivered alongside. As between delivery from the wharf to a vessel at ship's tackle and a delivery from the wharf to a barge alongside the wharf, there is not so very much difference as I understand the question. The only advantage would be in the tackles of the ship being able to keep your wharf clear and delivery clear when it is delivered direct to the ship. If it is delivered to a lighter and they are equipped in that way to handle the lumber. It is impossible in a contract for cargo sales to suit the capacity of a named vessel to know the amount of lumber sold in advance of actual loading of the vessel. It is impossible to know the invoice price to be paid for the lumber in advance of actual loading unless you simply assume specifications which might or might not be delivered. You have a base price. You cannot tell until it is delivered what your invoice price is going to be. The sales are all made on the basis of a list which takes the base price, and from that, either up or down, there is a variation, depending upon the various sizes, lengths and grades that you deliver. I recognize the paper which you show me. It looks like an Australian cargo or Melbourne cargo, export. I am familiar with specifications of Australian cargoes. 6x12 on

(Deposition of E. G. Griggs.)

there would remind me of one. Referring to my answer with regard to the meaning of the term "base price," I would say if you take a base price, according to the list—the list is gotten up on either a ten or twenty-dollar base. Such items as, for instance, excessive amounts of 6x12, generally admit [150—83] of an addition to the listed price of say, two dollars, possibly more, determined largely by the provisions of the contract of sale, or agreement with the seller, the question of lengths. The list is generally based on 16 to 32, and if short lengths from 12 to 16, they would take a lower price than the base price. 32 to 40, 33 to 40, 71 to 80, you would follow your list and get a different price on each item. You would then carry these different items out on the basis of your list, and the total invoice would be determined by what they would figure. I notice you have selected items here that take a higher price than the base, because they are generally three to five dollars better in grade, and that is a quality specification which is protected in the list. Assuming that these are the specifications for a cargo to suit the capacity of a named vessel, it would be impossible before the actual loading of that vessel to know the number of the different sizes and grades that would go into that vessel. Using barges as the receiving medium, instead of a ship, I don't think you could possibly determine the amount of lumber stated in the specifications that would be required to suit the capacity of a named vessel, until you load the vessel, because I notice

(Deposition of E. G. Griggs.)

here you have all kinds of lengths and you might not be able to stow those on the vessel; you might not be able to carry them. There are so many questions that come up in loading a vessel that alter the specifications, as to her ability to carry the particular cargo, that you cannot tell until you load the vessel. These questions that I have referred to as being numerous, do not apply to barges, you can put anything on a barge. Through loading of these specification pieces on a barge, I do not think that you could possibly secure the results with regard to the price of the cargo until you had loaded the vessel.

Thereupon the specifications above referred to were marked [151—84] “Defendant’s Griggs Identification 1.”

WITNESS.—(Continuing.) I want to add that I understand your contract is to load the vessel to capacity. My answer is based upon that. I know what a bill of lading is. Bills of lading are issued for cargo shipments, they are filled out by the mill furnishing the cargo and signed by the master. It would not be possible in a cargo sale to suit the capacity of a named vessel where there are furnished specifications to issue bills of lading in advance of the actual loading of the vessel to her capacity.

Cross-examination.

There is nothing impossible about delivering a cargo of these specifications to a barge. Any lumber can be delivered to a barge that is on specification. This lumber could have been delivered to a barge,

(Deposition of E. G. Griggs.)

but as to the lumber to be put on a barge there are certain definite specifications where definite amounts of each item can be delivered to the barge. I have seen that paper which is now handed to me (referring to Defendant's Griggs Identification 1). I saw it yesterday when it was showed to me by Mr. McClanahan. With regard to whether or not there was any particular object in turning down the top, I don't recollect about that top, I was looking at the specifications. My company manufactures fir, spruce and cedar. It is a member of the Douglas Fir Exploitation & Export Company. It is interested in the Douglas Fir Exploitation & Export Company, being one of the stockholders. It is also a member of the Pacific Lumber Inspection Bureau which works with it. I am a member of that Bureau. I don't think the company is a member. I will correct that—the company is a member and I represent the company in it. My company is directly interested in the outcome of this litigation as it affects the Douglas Fir Exploitation & Export Company. I assume that my company is affected by the outcome of this suit. Anything [152—85] that affects the Douglas Fir Exploitation and Export Company affects the several interests. My company, the St. Paul & Tacoma Lumber Company, has always been engaged in the export business. It ships about one-third of its capacity in good years, depending on the market, or it might ship one-half its capacity. Its capacity is rated at 120,000,000 feet. That would amount to an export

(Deposition of E. G. Griggs.)

of fifty or sixty millions a year, but it might vary. We might ship a quarter or a half as export, if the market is good. We call export ports anything away from the United States and its dependencies. I do not think the Philippine Islands is considered as export. I don't consider the Philippine Islands as export when I speak of the 50 or 60 million feet. It is an entirely different market. I will correct that. I would say Manila would be export. The Hawaiian Islands would not. That is handled on a different basis, and the Douglas Fir Company has nothing to do with it. I do not think the Douglas Fir can sell any lumber to Manila. I do not know of any cargoes there. All the export business we sell is connected with the Douglas Fir and handled by that company. It all goes through that company. Our mills are situated at Tacoma on Puget Sound. I would not consider that there is any difference between an export cargo and a domestic cargo. This question of the loading of a vessel coastwise to San Francisco would be a cargo, but it would not be covered by the export company. That is not in their field of business. The export business is handled by cargo. And domestic it might go anywhere without being a water-borne shipment. If we were selling a cargo to San Francisco the term would mean precisely the same as if we were selling a cargo to Melbourne, but covered by a domestic port. The term "cargo" does not mean anything different in export than it does in domestic business. The meaning of the term "f. a. s. mill wharf" is

(Deposition of E. G. Griggs.)

that it is on the mill wharf, free alongside the [153—86] vessel tied up to the wharf. That would be my exact interpretation. Delivery of the lumber free alongside the vessel tied or moored to the wharf. The term "f. a. s." means free alongside ship on the mill wharf. "F. a. s. mill wharf" means you should deliver on the mill wharf, free alongside the vessel. I say "free alongside the vessel" because that is my interpretation of "f. a. s." The vessel must come to the wharf to get the lumber or we must deliver it free alongside on barges. There is a difference between "f. a. s." and "f. a. s. mill wharf," because you might put it alongside the vessel on lighters in the harbor. In other words, when I use the term "mill wharf" it means it is to be placed on the wharf, that part of the destination is fixed by the term "mill wharf." I interpret the term "f. a. s." to mean free alongside. "F. o. b. mill wharf" means practically the same thing, delivery down there without cost to the vessel. In the term "f. o. b. mill wharf" it would be assumed that the vessel would come there and take it f. o. b. mill wharf. I think that the term "f. o. b. mill wharf" itself means delivery there on the mill wharf without cost to the vessel to bring it up from some portion of the wharf that they could not reach with the tackle. The responsibility of a seller ends when he places it on the wharf, provided it is delivered within reach of the ship's tackle at a certain place on the wharf. It has got to be within reach of the ship's tackle. From that point it is the duty of the

(Deposition of E. G. Griggs.)

buyer to take it. The buyer must take it as fast as the mill can get it down, that is all he generally attempts to do. So long as he does that he complies with his obligation. I do not know that the expression "on barges mill wharf" is ever used. "On barges a. s. t. mill wharf" means "at ship's tackles." You could put the lumber on barges and deliver alongside the ship, that is what we would be obligated to do under that contract. The vessel might lie in the [154—87] stream and you might give them alongside ship's tackle on a barge. I said there was practically no difference between the three expressions "f. a. s. mill wharf," "f. o. b. mill wharf vessel's tackles," and "Barges mill wharf ship's tackles." It is the custom of the port to have that in, in order to expedite delivery. I would assume there would be very little difference. There is practically no difference, except in handling to the barges in place of handling direct to the ship. It gives you three ways to furnish lumber. There are three different ways employed by these statements—I would say "f. o. b. mill wharf" does not determine absolutely that the lumber must be alongside ship within reach of the tackle. "F. a. s." specifies definitely it must be alongside ship. The customs of the port is that it must be within reach of the tackle. "F. o. b. scow mill wharf" means that the lumber might be delivered on the mill wharf or put on lighter and delivered alongside vessel at another hatch, which is often the custom of the port. So that they could work two hatches,

(Deposition of E. G. Griggs.)

and it would be without expense, of course, to the seller, the ship furnishing the lighters. Very often mills have lighters of their own to assist in delivery on that account, and whenever loading a particular cargo, in order to expedite delivery they have lighters and work different hatches from the lighters while they work from the dock, expediting delivery. You might bring lumber from other mills and help you out; then you have complied with your contract when you have brought the lumber alongside the ship.

Q. Now, I understand you to say if your lighter was alongside of the barge, you have not complied with the contract?

A. You might take on your lumber on a lighter; I don't know how you could determine what your vessel would take.

WITNESS.—(Continuing.) So far as the delivery is concerned, you could take it on a barge. I think that it would be more of a disadvantage [155—88] to the seller than to take it on a ship. You are not rigged to take it over as fast as you can get it. If the barge was rigged it would make some difference so far as the obligation of the seller was concerned. It is practically correct to say that these clauses, so far as determining the place at which the seller is to deliver the lumber are concerned, are the same whether the buyer should choose to take it on a barge or to take it on his vessel. If the barge was equipped in the same manner to take lumber as it is taken on the ship,

(Deposition of E. G. Griggs.)

I think the obligation upon the seller would be the same in all three clauses.

Q. There would be no difference between that obligation than the obligation to deliver to the ship, assuming the barge was equipped in like manner?

A. I do not know that I answered that correctly. The condition of the business is so definite, you could not possibly deliver lumber on a barge on the same kind of contract for a full cargo that you would have for the vessel, one is used to help the other.

WITNESS.—(Continuing.) I mean the full cargo clause. Where a sale is made for a definite number of feet and 15%, more or less, to fit capacity of vessel, the manner of ascertaining the sale is to load the vessel. If the vessel requires more than 15% more than that amount it is subject to special contract. In the case of a contract which calls for a definite amount and 15% more or less to fit capacity of vessel, and in a case where it turns out that the vessel is of a larger capacity than the 15% more than the amount named in the clause, the seller is not obligated to go on delivering above that amount. 15% being definitely stated as the lumber, he would stop there and negotiate specially for the additional lumber to fill to capacity. He certainly would negotiate specially. I have done it and I know. That is all I [156—89] have done. He would not be bound to do it. Under that particular contract of sale he would not be bound to make any additional contract to deliver further. According

(Deposition of E. G. Griggs.)

to the customs of the port, if he is not loaded to capacity I think he would be bound. Assuming a contract of a million three hundred thousand feet, a clause of 15% more or less to suit capacity of the vessel—assuming that the vessel has a capacity of two million feet—I think that the seller could stop when he had delivered 15% more than the one million three hundred thousand feet. I don't believe that there is any contract that would ever be interpreted that way, if you had "to capacity of the vessel," if the capacity of the vessel varied that much, which is theoretical, because it never would, there is an obligation of the mill to load the vessel. I think if it went over 15% and he demanded that, the custom of the port would be that he would negotiate at a price for the additional amount of lumber. That price might be more or less than the amount named in the contract. If the vessel turned out to be smaller than 15 per cent less than the definite amount named, and that point was reached and the vessel was full and could take no more lumber, and yet they had not reached the 15% less than the definite figure named, the buyer would have to take that lumber and probably arrange for additional cargo on the rest.

This certificate of inspection that I speak of is issued to the vessel when loaded. It is issued by a Government officer, the marine surveyor's certificate. There is also the inspection certificate. I was asked about a marine certificate, surveyor's certificate as to the vessel's condition to take the

(Deposition of E. G. Griggs.)

cargo and her ability to take the cargo, whether she can take more or less, that is what they generally determine. That is all determined by the marine surveyor and the master of the vessel. It does not affect the obligation of the seller to deliver, it simply affects [157—90] the contract that is covered in that 15% more or less. Ordinarily, that is on her definite 15% more or less clause. The other certificate that I have spoken of is the lumber inspection certificate. I would not have mentioned it if you had not referred to it. There is nothing impossible about putting lumber on a barge and then afterwards putting it on a vessel.

Redirect Examination.

The extent of stock ownership of my company in the Douglas Fir Exploitation & Export Company is nominal, just what we have to take in order to become members of it. I do not recollect just how the shares are. We are simply members of the bureau on some definite basis. As to membership, we are all in on it. The Douglas Fir is a sales organization for export lumber. The term "f. a. s." implies the delivery alongside a ship. There is a difference between the expression "f. o. b." standing alone and "f. o. b. within reach of ship's tackle." On cross-examination I said that it was my understanding that the barge was being used by the buyer in taking a delivery. I have never known of a buyer taking delivery of a cargo, that is, an export cargo, on barges. I was talking about something on cross-examination that I had never heard of

(Deposition of E. G. Griggs.)

before. I have never seen a cargo handled on barges. Partial lots only would be delivered that way. Barges are used in cargo sales in such transactions in this port in loading vessels to expedite delivery and in getting lumber from different mills to assist in loading; we often deliver on barges alongside vessel at the wharf. The seller often does that. For only cargo lots, that is the only use I know of for using barges in connection with cargo sales for export. I said that there would be no obstacle in taking delivery of these specifications, lengths, breadths and sizes on barges, the definite figure intended by the parties in agreeing for 15% more or less is the capacity of the [158—91] vessel, the supposed amount that she will carry on the rated tonnage of the particular vessel, the capacity of the vessel. It is very necessary to have that estimate of the vessel as to what she will carry.

Recross-examination.

We have no mills on the Columbia River, nor at San Francisco, nor at Eureka Bay, nor have we ever loaded vessels from these points. I did not say exactly that we never loaded or ever knew of lumber being put upon a barge and subsequently put upon a ship; I said I never knew of a full cargo being loaded on barges of the capacity of a vessel to load, the ship cargo, the full cargo being put on barges and being handled to the vessel. I have often handled lumber by loading it on a barge and then taking it from the barge and putting it on the

(Deposition of E. G. Griggs.)

vessel, but I never knew of a cargo mill taking a cargo and loading it on lighters and putting it out to a vessel for the full amount of the cargo. I have known of them taking parts of shipments and handling the cargo both ways. Some rail mills might ship in parts of cargoes and put it on to scows and deliver the cargo that way because they are not equipped with a wharf. Any cargo mill that has a wharf simply utilizes the two means of delivery alongside. There are some mills in California that sell without having any wharf at all. In such sales as that I am not familiar with the custom of the port. These mills deliver on barges alongside ship's tackle wherever she lays. The railroad delivers it alongside some wharf, generally the railroad wharves. There is nothing impossible about sending it by rail; where it is shipped by rail here it is handled and put on barges and delivered alongside the vessel. I know of several inland mills here that ship here and from Tacoma in cargo lots. I know one mill, the Pacific States Lumber Company. [159—92]

Deposition of E. G. Ames, for Defendant.

Thereupon the deposition of E. G. AMES, a witness called on behalf of defendant, was offered and admitted in evidence, but was not read to the Court.

Direct Examination.

I am sixty-three years of age and engaged in the lumber manufacturing business. I reside in Port

(Deposition of E. G. Ames.)

Gamble. My business is situated at Port Gamble and Port Ludlow on Puget Sound. That business is the manufacture and shipment of lumber. We do an export business mainly. The firm has been in that business for sixty-three years. I have been connected with the firm for forty years. My connection with it is manager. I have been manager about five or six years. I have no other business, although I am connected with a great many other business institutions that are connected with the lumber business. One of them is the West Coast Lumbermen's Association; the Douglas Fir; and the Pacific Lumber Inspection Bureau. I am president of the Pacific Lumber Inspection Bureau. I am treasurer and one of the directors or trustees, as we call them, of the defendant in this case. The name of our mills is the Puget Mill Company. The Puget Mill Company is also a stockholder in the Douglas Fir. Some of the larger firms put in more money than the smaller ones. I think we have \$10,000 in it. The output of our mills, on one shift a day, is one hundred million a year. With regard to the proportion of that which is for export, we have never done any other business but cargo business, until within two years. All of our lumber has been shipped on vessels, water-borne cargoes, domestic and foreign, and the amount that has gone domestic and foreign has varied according to market conditions. I imagine forty per cent of our output has been exported, perhaps a little more. The last year I do not think we exported over eight per cent.

(Deposition of E. G. Ames.)

That is from forty millions to eight millions. Not because of lack of tonnage but [160—93] because of conditions. These conditions were not peculiar to us. We have gone into the rail business and shipped some by rail during the last two years, and we are getting ready to do both kinds of business.

I am familiar with the terms that are used in cargo sales for export. The meaning of the expression “f. a. s. mill wharf” is free alongside the ship, on the dock within reach of the ship’s gear or tackle. In a contract for export it has the following significance: We receive a contract to load a vessel and furnish a cargo of lumber. The ship expects to berth at the dock; the dock facilities at the sawmills are limited. Now, we also agree to give her certain dispatch. We accumulate lumber as fast as we can. And when we accumulate that lumber, we have already designated where a certain ship is going to load a certain cargo. Now, that lumber is usually within the limits of the lines of the gear of the ship to pull it out on to the dock, get hold of the lumber and drag it on board—that is a delivery. And when it says “Free alongside,” my opinion would be that that is to do away with the condition—excepting in a place like Seattle, where they would have to pay wharfage. Now, the mill charges no wharfage, no dockage or anything of that kind. We simply agree to furnish that lumber free of any expense to the ship where they can get hold of it, within reach of the ordinary gear. It is the question of delivery that that

(Deposition of E. G. Ames.)

phrase applies to. There is a custom touching the question of the place of delivery in cargo sales that are made f. a. s. mill wharf. That custom is that you have to put that lumber within reach of the ship's tackles, free of any expense to the ship up to that point. And another thing, the delivery, according to custom, is when the ship puts her line around that load of lumber to take it aboard. There is a custom touching the question of the ascertainment of the amounts of lumber sold where the contract [161—94] names a definite amount, coupled with the expression "15% more or less to suit the capacity of the vessel." That custom is that the vessel is estimated to carry, say, thirteen hundred thousand, she might carry more or she might carry less. And to make it definite as to how much the seller is obliged to furnish or how much you have sold to the buyer and can make him pay for, why, that 15% will say—one or the other—is always incorporated in the contract where you are to furnish a full and complete cargo. Under such a contract it is not possible to know how much lumber has been sold in advance of the actual loading of the vessel. Under such a custom it is not possible to know in advance of the loading the invoice price of the cargo sold. A sale made f. a. s. mill wharf of a cargo to suit the capacity of a named vessel, cannot be delivered to barges without the capacity of the vessel being known. No vessel will carry the same amount of lumber twice in succession. She might carry a dozen cargoes and all vary, due to various conditions. For in-

(Deposition of E. G. Ames.)

stance, we have loaded vessels time after time, contract after contract, and when they get down to their loading marks, still the deckload may be 18 inches lower than it was on some other trip on account of weather conditions—water, snow, ice, and there might be a great many things. I would not know how much a vessel would carry when we commenced to load her even. I would not know it until she got through being loaded.

I have heard of the expression “f. a. s. mill wharf.” I have heard of the expression also of “f. o. b. mill wharf within reach of the vessel’s tackles.” Technically there might be a difference between f. o. b. mill wharf and f. o. b. mill wharf within reach of vessel’s tackles. The expression “f. o. b. mill wharf” necessarily requires the presence of a vessel. The expression “f. o. b. mill wharf within reach of vessel’s tackles” certainly requires the presence of a vessel. I do not think there is any difference between the meaning [162—95] of f. a. s. mill wharf and f. o. b. mill wharf within reach of vessel’s tackles. I know of the expression “at ship’s tackles,” or “within reach of ship’s tackles.” It is a new expression. It is “a. s. t.”; it has come in in the last ten years. It has the same meaning as “within reach of ship’s tackles.” That expression is familiar to me now. That expression is put into the contract to make it definite what the delivery is, so that the seller knows what he has to do. It is put in for the benefit of both parties so that there is a clear understanding just

(Deposition of E. G. Ames.)

what you have to do. The question or matter of dock space is certainly of materiality to a mill. The question of ship's tackle has nothing to do with dock space. The benefit of the expression to the seller is that he knows that he has to deliver that where the ship's gear can get hold of that lumber, that is all. The dock space has nothing to do with that so long as you get within reach of any gear of the ship. I think there is a difference to the mill between a delivery from the mill wharf, taken by a vessel, or delivery from the mill wharf taken by barges. It would differ with the way different plants are planned, and the way our plants are planned. With regard to what difference is, the important thing in taking deliveries is the availability of our dock spaces, to keep your mill going, and you have a certain amount of lumber which you have to furnish to a vessel, and it is important to you that the vessel at least takes that quantity of lumber, so that she don't use that dock any more than absolutely necessary. Under ordinary circumstances that cannot be accomplished by a barge taking delivery as readily as by ship taking delivery. In sales of cargo lots for export, made to suit the capacity of a named vessel, it is not possible, in my opinion, to make delivery of that cargo to a barge to suit the capacity of a named vessel. It is impossible to know the prices of a cargo sold to suit the capacity of a named vessel [163—96] if the lumber is attempted to be loaded on to a barge. Looking at the exhibit marked

(Deposition of E. G. Ames.)

“Defendant’s Griggs Identification 1,” purporting to be specifications, I would not know how these specifications for a cargo to suit the capacity of a named vessel could be fulfilled by loading on to barges. Of course you can put the lumber shown on these specifications on to the barge, but you could not put it on to a barge so as to suit the capacity of a named vessel. The reason for that is that if I were going to do that I would want a definite amount. You could not put these lengths, breadths and sizes to suit the capacity of a named vessel on that barge unless you knew exactly what the ship was going to carry. I could not fill that order in proportion. It is possible to ascertain the amount a ship is going to carry only as you load her. We would under-saw or increase, from time to time, until she was finished. I might make that clear. If we sawed that 6x12, the whole of it, and put it on board the ship, and then she did not carry the total amount of this order she would be overshipped in some items and some other items would not have the proper amount. Theoretically, the captain of the ship determines when a ship is loaded to her capacity. Practically, it is the marine surveyor. He issues a certificate when she is loaded. I have never known a marine surveyor to issue a certificate until the vessel is actually loaded. He designates the point down to which she can load. When she gets there she is stopped. If they don’t stop, they don’t get a certificate. I have known them make ships discharge lumber.

(Deposition of E. G. Ames.)

I have said that I am president of the Pacific Lumber Inspection Bureau. They print these lists called "G" lists and have them for sale. I know that that list contains certain terms of sale. Where a contract is made subject to the terms and conditions of "G" list, the certificate issued by the surveyor cannot [164—97] be issued until the vessel is loaded and specifications and schedules made up complete. Our Bureau inspects lumber aside from lumber that is loaded on vessels. With regard to whether or not it would issue a certificate for lumber that was inspected in a warehouse, I would say that the certificate would have to state the exact fact. We would inspect it if asked to do so, but the certificate would state where it was inspected and the time.

Q. What does the expression, with reference to the prices of lumber \$9.50 base "G" list, mean?

A. "G" list is not the list in force now. As I remember it, it was \$20.00 list. That is, the base price is supposed to be \$20. Now, the prices of every size and different grades and lengths of lumber provided by that list, was all rated in value comparatively to twenty dollars, which applied to some particular size or sizes of lumber of a certain grade. Lower grades would be less here; higher grades, larger sizes and wider widths and longer lengths would be more; the differential applies there.

Q. If the base price is \$9.50, would that \$9.50 base apply to these various lengths, breadths and sizes enumerated on this schedule identification

(Deposition of E. G. Ames.)

Griggs 1, the specifications which have been marked for identification?

A. That would mean whatever price shown by the list, say 6x12, 16 and 32 feet long, if that is correct, is as appears in the list, that it would be as many dollars less than that price as \$9.50 is the base of the list—that would be \$10.50. So you take ten and a half off of every price listed in the list; that you would figure this up on the value of the list and check off ten and a half in there—it amounts to the same thing.

WITNESS.—(Continuing.) The base price of \$9.50 applies to [165—98] every item in the order. It does not mean that every item in the order is worth \$9.50 a thousand. There are different prices for all these different sizes. There are different prices for all these different sizes, these different grades and lengths, and also for these two qualities. Now, there is one included which I presume is merch., this says select. And there is a different price for the better grades or select.

Cross-examination.

The prices of the lumber indicated on Defendant's Griggs Exhibit 1 for Identification can all be figured out. If the sale was \$9.50 base "G" list, less two per cent and 2½ per cent, you could figure it out according to the list. That would not show what the value of that lumber was. I doubt if you could get these figures in feet, board measure exactly, as shown on this list, because you take the 6x12, 40 feet long.

(Deposition of E. G. Ames.)

There is a certain number of feet in it. If this amount is not divisible by that, you could not fill it exactly. There might be a fraction more or less. A fraction of the contents of an average piece, more or less, you could not tell. As to 33x40, 16x32, you would not know how many pieces there would be. You would not know just what you would have of the 33, 34, 35, 36, 37, 38, 39, 40, or as to how many pieces of each length. You would not know until the ship was loaded. The 200,000 feet here would not indicate it at all. You could not tell. It might vary a thousand feet more or less. You would have to figure all that up and find out just exactly what there was. You could not do that in advance. You could not do it until you had shipped it. If this lumber were on a barge you could figure out the price of it as to what went aboard the barge. It could be put on a barge. If you are going to put that amount on a barge you would want a definite order. It is not sufficiently definite because the chances are that buyers and sellers [166—99] of lumber, particularly the buyers, are very technical. If they can see a chance to get anything on the poor seller they will take advantage of a technicality. When we deal with them we want things understood.

Q. Are the buyers so—

A. Yes, they certainly are.

WITNESS.—(Continuing.) I certainly represent the seller's point of view; I know what I am talking about. I have had trouble making settlements with any of them. I am quite sure I have had

(Deposition of E. G. Ames.)

trouble and differences with the Comyn Mackall Company. Our relations are very friendly, though we have had our business troubles. I have not any of these troubles at present, that I know of.

Q. Then I understand you to say if the lumber was sold f. a. s. mill wharf, or f. o. b. mill wharf within reach of ship's tackle, or on barges mill wharf at ship's tackles, the obligation of the seller has ended when he has put the lumber at the place specified in your definition?

A. Yes, that is what we expect to do.

WITNESS.—(Continuing.) That is our obligation. It is up to the buyer to take it at that place. If he comes along with his vessel that was named, why I would not hesitate, but I certainly would not deliver to anything else unless I had a thorough understanding as to where we stood, and I might have reasons for refusing, anyway. It would be in the contract. The vessel is named in the contract as part of the contract. When I mentioned 1,300,000 feet when counsel asked me in regard to the 15% more or less than the definite figure, I did not have this particular sale in mind. I meant any sale. There is nothing in the 1,300,000 feet that would be different from any other sale, that amount of lumber, 15 per cent, more or less. It would state a definite amount. Might be a million, might be eight hundred thousand. Might be six million, [167—100] according to the ship. But nobody knows exactly how that ship is going to take this 15 per cent more or under, that is the limit. When we get over

(Deposition of E. G. Ames.)

that 15% the seller would not quit. I will tell you what I would do. I would not furnish any boat, under certain conditions I could conceive that would exist, without a new contract or understanding. I would stop. On the other hand, if I had sold the minimum amount and the ship did not take it, I would expect them to take it and pay for it, under certain conditions. If they could not take it on that vessel they would have to make arrangements. I would consider I had a fair claim, if I wanted to enforce it. I did not say exactly that there is nothing impossible about delivering this lumber to a barge and then the barge subsequently putting it on the named vessel. Before I would do a thing like that, I would think that I had a right to refuse to do anything that was contrary to my orders. There is no physical impossibility. You can do most anything.

Q. And if it was put on to the barge physically, it would be, of course, the duty of the seller to get it off on to his ship—the duty of the buyer to get it on to his ship?

A. I do not think the mill furnishing—it sells through a second or third party, sometimes they go through four parties—that he has any right to consider the contract other than technical and stick to it.

WITNESS.—(Continuing.) Speaking not of the construction of the contract but the physical fact of delivering the lumber on to a barge and thereafter delivering from the barge to the vessel, I would say that we could put it on top of the sawmill if we wanted to. Under this contract, or any contract

(Deposition of E. G. Ames.)

containing a clause such as I have been speaking of, f. a. s. mill wharf or f. o. b. mill wharf alongside vessel or on barges at ship's tackle, the seller having put it there, I don't think I would permit the buyer to take it [168—101] from a barge and put it on his vessel. I think physically he could do it, but I don't think I would permit it. I can put it on top of the mill if I want to. Probably I would not be putting it in a different place under that arrangement in case his vessel was actually able and did reach the side of my wharf. Physically you can do anything. That is the delivery we calculate to make. We calculate to stop when we put it on either our wharf within reach of ship's tackle or on our lighter alongside the vessel, and we expect to stop there. We expect the buyer to take it from either of these points, according to his contract, depending on what the contract says. I would expect him to take it from those points, if that is provided by the contract. Under this custom of delivery it is customary for him to take it then and there at these points.

This Bureau, of which I am president, would inspect the lumber wherever they were asked to inspect it, and our certificate would show the place where and when it was inspected. There is no essential difference between these customs as to delivery and definitions of these terms, between sales in domestic and in foreign or export business. We ship all our export business through the Douglas Fir Exploitation Company. I am treasurer and a trustee of the Douglas Fir. This expression "a. s. t." is a new one.

(Deposition of E. G. Ames.)

It came out within a few years. It means alongside ship's tackles, at ship's tackle; within reach of the ship's tackle, it is all the same; it means at ship's tackle. There is nothing impossible about a barge taking 60,000 feet a day if they are fixed up for it.

Redirect Examination.

With regard to what I said concerning a certificate of inspection in a warehouse, for lumber, or some place other than on a ship, it would be the same certificate where the lumber is inspected [169—102] on a vessel; it would be a certificate on the form and terms and conditions as of "G" list, where the inspection was in a warehouse. If the Bureau was instructed to inspect and tally lumber in accordance with "G" list, that would cover the grades provided; we would not know about anything else. We would not know about any contract. I remember the conditions under which the certificate is issued, where the loading is on a vessel. These terms and conditions could not be fulfilled if the inspection and certificate were issued on lumber in a warehouse.

Recross-examination.

By that I mean it would show the lumber was in a warehouse. It would not follow it up by saying where it went. It would give the same grade and the same tally, but show that it was in a warehouse. I think I saw this paper which was exhibited to me by counsel yesterday afternoon, but I did not notice it particularly, I could not identify it. I paid little attention to it. If a vessel took on more lumber than the United States Marine Surveyor permitted

(Deposition of L. A. Mansur.)

it to carry, it might have to discharge lumber. As to where it would have to discharge the lumber, I do not know; that would be a complication. [170—103]

Deposition of L. A. Mansur, for Defendant.

Thereupon the deposition of L. A. MANSUR, a witness called on behalf of defendant, was offered and admitted in evidence, but was not read to the Court.

Direct Examination.

I am 38 years old. I live at Knappton, Washington. I am in the lumber business, connected with the Knappton Mills & Lumber Company, in the position of Superintendent. I have occupied that position about 11 years. I have been in the lumber business since I was big enough to walk around, say twenty years, anyway. I remember the coming to our dock at Knappton of a launchman, whose launch had brought a barge into the bay there. Assuming that was in November, 1917, I was there at that time. With reference to the barge, the launchman said that he didn't know what the barge was for. We did not know what the barge was for. He said he thought the barge was for airplane spruce. He was told that we had no airplane spruce. The barge was tied up alongside our log boom about 100 feet from the end of the loading dock. I learned what the barge was for a few days afterwards when the stevedores came over with a notice from the outfit to load the barge. They did

(Deposition of L. A. Mansur.)

not load it and it remained there, I should say, a week or more. I would not commit myself on that, but it was more than a week. I can identify this paper which you hand me, that is the notice that was handed in by the representative, I think his name was Davis. The card which is pinned to the letter itself, was, I believe, Mr. Davis' card.

Thereupon said letter, with said card attached, was marked "Defendant's Mansur Exhibit 1 for Identification," was attached to said deposition, and was in words and figures as follows:

Defendant's Mansur Exhibit No. 1 for Identification.

"San Francisco—California.

November Sixth—1917.

Knappton Mills & Lumber Company,

Agents—Douglas Fir Exploitation & Export
Co.,

Knappton—Washington. [171—104]

Dear Sirs:

Please deliver the under-mentioned lumber, in good order and condition, to Mr. Henry Rothschild or bearer:

1,300,000' of Douglas Fir purchased from you under contract dated November 2nd, 1916, and in accordance with specifications handed you in San Francisco under date September 19th, 1917.

Very truly yours,

COMYN, MACKALL & CO.,

Per J. CLAUDE DALY.'"

(Deposition of L. A. Mansur.)

WITNESS.—(Continuing.) I saw the barge after that. I could not give the measurements of the barge. I should say she had about probably five feet freeboard, and just roughly would estimate the barge to carry about 200,000 possibly 250,000 feet. She had no equipment on board. There was no donkey-engine. I did not see any tackle of any kind. I could not say the exact number of stevedores that were brought to the mill at that time, but perhaps there were six, including the boss. As to paraphernalia they had a few peaveys and two or three dolly rollers.

Thereupon the witness was shown Defendant's Griggs Exhibit 1 for Identification.

WITNESS.—(Continuing.) It would not have been possible to load on that barge specifications such as there shown at the rate of 60,000 feet per day. I have had experience in loading lumber vessels. I have been in the cargo business about eleven years. I have had experience in handling Australian specifications such as that which you show me. The business of our mill is both export and domestic. We have done cargo export business in former years perhaps 25%. I have been in the cargo export business about eleven years myself, while I have been there. The mill was in the cargo business for about fifty years. My duties with reference to the loading of vessels for export is that I am general superintendent. I see that everything is carried out right, that the ship fulfills her part of the agreement and that our men fulfill our

(Deposition of L. A. Mansur.)

[172—105] part. I have occasion to watch the loading of vessels. As to the instrumentalities used in loading a vessel, they have a donkey-engine and gear that lifts the lumber. They load the lumber in slings, throw a chain around it, and hoist it up and swing it on the ship. The donkey-engine generally belongs to the ship, and the lift cable. The peaveys and hooks, sling-hooks and that gear generally belongs to the stevedores. The tackle belongs to the ship. The mill does not furnish any of that paraphernalia. My opinion as to the amount of lumber that could be loaded on to a barge, or that particular barge, from the specifications shown, with the crew that was there, would probably be about fifteen or twenty thousand feet per day. The only way that could be done would be that the lumber would have to be put on rollers and shoved by hand or dragged by hand, and there is only one part of that specification that could be handled that way. The larger sizes would be very difficult to handle; it could be done, perhaps, but it would be very difficult. I should say that it could not have been handled with the crew that was there. The size pieces that I refer to are, I should say, from 16x16 51' to 66', up to 24x24 and 16 to 32. 24x24 means 24 inches square. The other is the length, 16 to 32. It is pretty hard to make an estimate, but, in my opinion, I would say that it would probably take six barges to carry that particular specification if they were of the same size as that one there. The question of giving dock space at our mill is an important one

(Deposition of L. A. Mansur.)

to the mill. We have plenty of dock space for ordinary use, but there never was a mill that had too much. It would take less time to clear the specification lumber from our mill if loaded on a ship with tackles than if loaded on to barges. You would have to figure out how much less time it would take. They agree to take at the rate of 60,000 a day, ordinary cargo is 60,000. I should say that the barge would not be able [173—106] to take more than fifteen to twenty thousand a day at the most. I think that if there were six or seven barges there, of a greater number of barges than one, about one barge could be used in the handling of the lumber each day at the same time. We could not very well handle more than one. Two could be handled; that would depend on the way that the lumber is put on the dock. When you put lumber on the dock for a sailing ship, it is placed on the dock for the operation of one gear only, that is for sailing ships. A sailing ship has only one gear. If we take a contract for a sailing ship we would expect to have one point of loading on the dock. It is the custom because the ship only has one gear.

I know the ship "W. H. Marston." I believe that she has not more than one gear. If delivered to the "Marston" or to a vessel with one gear, I believe that the lumber as prepared on the dock could not be handled with two barges with gear on each at the same time, but that there would have to be a rearrangement of the lumber. The space to be occupied by the use of two barges would be

(Deposition of L. A. Mansur.)

greater than the space occupied by a ship with one set of gears.

I know the meaning of "f. a. s. mill wharf." I have seen that term ever since I have been in the mill business. It is in the Pacific Inspection Book, it means "free alongside ship mill wharf." I never knew there was any particular difference between the expressions "f. a. s. mill wharf" and "f. o. b. mill wharf." I never thought there was any difference between "f. o. b. mill wharf" and "f. o. b. mill wharf within reach of ship's tackle." I have always had to do with shipments by water. In my opinion, it would not be possible to load on barges from these specifications lumber to suit the capacity of the "W. H. Marston." As between taking delivery from the mill wharf by a ship and taking delivery from mill wharf by barges, the method of taking lumber on the ship by [174—107] ship tackle is the most advantageous to the mill because she has the gear to lift the lumber, and if the lumber is not already on the front of the dock it is brought in on trucks and is removed right off the trucks with the gear. It is an advantage in a lot of ways. There are other things. With heavy pieces, heavy sticks, good management would put the heavy sticks right to the front of the dock where the ship can put their chain around it and lift it and if it is back, you have to lift it by hand. If you have no tackle to lift it with you have to lift it by hand. It would be possible to rig up tackle on a barge to lift heavy sticks of that kind to the barge. If it were possible

(Deposition of L. A. Mansur.)

to do that, I don't believe that lumber could be removed from the dock as quickly by such tackle as by ship's tackle. It is absolutely impossible to know in advance of the loading of a vessel what her capacity is. Vessels vary in their ability to carry lumber. Some vessels vary in their cargoes. I would say that the size of the lumber has a great deal to do with it on account of the stowing in the hold, and then the climatic conditions have a whole lot to do, the rain falling, the lumber is soaked with rainwater and it is heavier. If it has snow on it, snow and water, it is heavier, and she don't carry so much. The question of stowage has something to do with the varying of the cargo capacity of a vessel.

Q. Would it be possible, in loading to barges specifications there before you, to know how much of the laths and pickets would be used in the stowage of the named vessel to suit her capacity?

A. You could not tell about that; impossible.

Cross-examination.

WITNESS.—(Continuing.) I don't know that we refused to deliver lumber to any barge at all. I don't know that we did particularly. The "Marston" was never at our dock that I know of. She was [175—108] not there between December 1st and 31st, 1917. We would not have delivered to any barge. We would not deliver to the barge. We would not have delivered to any other ship than the "Marston." If any other ship than the "Marston" had been there, we would not have delivered it. I

(Deposition of L. A. Mansur.)

don't believe it is possible to put 60,000 feet of lumber a day on a barge. It could be done with the proper equipment. I think it is possible for a barge to be rigged up like a steam schooner. Anything is possible. I was never on board the "Marston." I have seen her at a distance, but never was on her. The first that I knew that this launchman who had come to us and asked for some lumber was connected with the Comyn, Mackall Company was when the demand was presented some days later by the stevedores. I didn't know who this launchman represented when he first came. Sometimes towboats leave barges at our dock for an hour or two, or sometimes for a day and sometimes for a week. It is always customary to come and ask permission, which we generally grant. This man brought the barge and came along close to the dock and wanted to know where he was to fetch the barge, and we knew nothing of the barge, knew nothing of what it was for, neither did he. He said he thought the barge came there for some airplane stock. We had no airplane stock. And he had orders to put the barge alongside the boom, which he did. It was the launchman who brought the barge. Two or three days, I think, after that the stevedores came. It might be longer; I would not be sure of that. When they came they presented this written letter which has been offered in evidence here. I knew that referred to 1,300,000 feet of Douglas fir in dispute in this case. So far as I remember, I told the stevedores we had no lumber for Comyn's at all.

(Deposition of L. A. Mansur.)

Mr. McCLANAHAN.—If you had received orders from the Douglas Fir to deliver a million three hundred thousand feet to any other [176—109] vessel, would you have done it? A. Yes, sir.

WITNESS.—(Continuing.) We would have done anything that the Douglas Fir told us to. We were acting under their instructions. I cannot recollect just what orders were given us in regard to Comyn, Mackall Company. My best recollection is that the only orders would have to be to deliver the lumber to the “W. H. Marston.” If the “W. H. Marston” had come in we would have delivered the lumber to her. Those were my orders. I could not say whether or not my orders were also not to deliver to any other vessel than the “W. H. Marston.” There was not anything stated definitely not to, but we would not, that was not in the contract. I am familiar with the ordinary contracts. I was not personally familiar with this contract in November, 1917. I was acting at that time strictly under the orders of the Douglas Fir Exploitation and Export Company, and our own judgment. We have been in this business a long time. I had not seen this contract. We were acting under the direction of the Douglas Fir Exploitation & Export Company. I cannot say exactly what their direction was, our correspondence was that we were to deliver cargo to the “W. H. Marston,” that is the direction. It is the only direction that I can recollect.

Redirect Examination.

I am not in the office department of our mill a

(Testimony of L. A. Mansur.)

great deal. I am there part of the time, but my principal business is outside, all over the place. The office books are kept by some one else. A lot of things might transpire through the office without my seeing it, but anything of importance comes to my notice.

Recross-examination.

I didn't say that nothing came to my notice with regard to this matter. Nothing did come to my particular notice in regard to this shipment. [177—110]

Testimony of A. A. Baxter, for Defendant.

A. A. BAXTER was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination.

My name is A. A. Baxter. My home is in Oakland, and my business is in San Francisco. I am the general manager of the Douglas Fir Exploitation & Export Company, the defendant in this case, and have been ever since its organization, or rather since it commenced actual business. It commenced actual business November 1, 1916. The general business of this defendant is the selling of lumber for export only. Lumber manufacturers, manufacturers of fir lumber in the States of Oregon and Washington, are, in general, the members of the Association. There are none in California. The plants are in Oregon and Washington. Some of the headquarters of the owners are in California.

(Testimony of A. A. Baxter.)

Only the manufacturers are the stockholders of the corporation. This contract, prior to October 11, 1916, was drawn by me. During all of October, 1916, and for seven years prior to that time, I was the manager of The Charles Nelson Company. They were owners of two large mills, and these two large mills, it was known, were going into this combine, and I was slated to be manager of the combine. About October 11 it was known that the combine would be accomplished. There was then a rush of the exporting merchants to cover these cargoes that they had already sold, and the commitments they had already made, because they anticipated the combine would immediately put up the prices. Several of them asked me over the telephone what we proposed to do. Then Mr. Comyn came to me about these four cargoes. I told him we would take care of them. He said he had committed himself, or had sold them at a \$10 base. I told him we would take care of him at that price. I had no authority to sign or to make a contract in the name of the new company; I made the contract with him in the name of the old company at a \$10 base. The new company actually [178—111] started business on November 1, 1916. Other merchants sent in their cargoes, and they all reported them sold at \$9.50 base, and we were taking care of them at the price they had been sold at, before we put up our price. At that time I told Mr. Comyn that we had taken all the others on at \$9.50, and I did not think it would be fair to take his at \$10, and for that reason

(Testimony of A. A. Baxter.)

we cancelled that entirely and substituted the new contract at \$9.50. The new contract is dated November 2d. The first contract was the contract with the Charles Nelson Company. At that time that company had nothing to do with the Douglas Fir Company, so that really the Douglas Fir Company took over the obligation of the Charles Nelson Company with respect to those four cargoes, and put them in at a price of \$9.50 instead of \$10, half a dollar lower than the original price at which the contract was made, so as to put Mr. Comyn on the same basis with all the others. Prior to November 2d, Comyn, Mackall Co. were not approached to go into this combine. They had nothing to do with it. They were not at any time in the category of manufacturers. I wrote this contract myself. The "G" List referred to in the contract is a schedule that provides for the conditions of the sale, and the prices that vary accordingly as the lumber becomes more valuable or less valuable than the base price.

Mr. McCLANAHAN.—Q. What is the base price which we have been talking about in this case, the base price of \$9.50?

A. The list is printed at a \$20 base.

WITNESS.—(Continuing.) I am speaking of the present list. The "G" list is printed at a \$20 base. When it says \$9.50 base, it means a discount of \$11.50 on everything in the printed list. If it were a \$20 base, it would mean just the printed list. If it were a \$30 base, it would mean \$10 above the printed list. Taking the \$9.50 base, you would figure

(Testimony of A. A. Baxter.)

a cargo of fir under Australian [179—112] specifications by taking \$9.50 as the base and add to it the differentials, whatever there was over \$20 in the printed list, or deduct from it for anything there was below \$20, in the same proportion. I do not mean to say that the deductions for all would be the same, and that the increase for all would be the same. The list is printed relatively, to show the relative values of everything that is listed in the list, everything that is printed in the list.

The COURT.—Q. Let me see if I understand. Here are 1 by 3's, that are listed at \$25, \$27.50, \$29.50 and \$30.50; that is on a \$20 base, as I understand you?

A. Yes. This is \$5 above, that is \$7.50 above, that is \$9.50 above, and so on.

Q. That is, if you take a \$9.50 base?

A. Then it would be \$9.50 plus 5.

WITNESS.—(Continuing.) It is possible that under the specifications in this case there is a different price attaching above the \$9.50 "G" base to each of the kinds, conditions and sizes of the lumber. There may be instances where there is a deduction from the base price; if there is anything printed there below \$20, that would be the case, but I think \$20 is the lowest printed price in the list. The "G" list is a price and condition schedule used by exporters of lumber. It applies to exporting lumber. The export lumber is the kind that I deal in. I have been in the lumber business about thirty-seven years, all on this coast; in British Columbia, Wash-

(Testimony of A. A. Baxter.)

ington and California, the last 29 years in San Francisco. I have been connected with the export lumber business for 29 years. I am familiar with the trade terms used in contract for export lumber. The term "F. A. S." is a familiar one to me. The initials "a. s. t." mean, in such a contract, at ship's tackle. The term "15% more or less to suit capacity of [180—113] vessel" is a familiar one to me. That term is used very often in contracts for exporting lumber. The meaning known to the trade here of the letters "f. a. s." in an exporting cargo contract to a named vessel, is free alongside within reach of ship's tackles. The expression necessarily conveys the idea of the presence of the ship. The meaning of f. o. b. mill wharf within reach of ship's tackle is the same thing. There is practically no difference between the expression "f. a. s. mill wharf within reach of ship's tackle" and "f. o. b. mill wharf within reach of ship's tackle," but "f. o. b." is not customarily used in the cargo trade, but it is occasionally used. "F. a. s." is a customary water phrase. In contracts for cargo lots, where there is a named vessel, and where there is the expression used "f. a. s. mill wharf within reach of ship's tackles," there is a custom known to the trade on this coast that requires the presence of the vessel at the mill wharf. That custom as been known to me as far back as I can remember. During my whole business life of 29 years in the cargo business, it has been known to me. It was known to me in November, 1916. That custom is generally recog-

(Testimony of A. A. Baxter.)

nized along this coast by the export shippers, and it was so recognized in November, 1916. In contracts for cargo lots to named carrying vessels, where the expression used is "15% more or less to suit capacity of the vessel," there is a custom which existed in November, 1916, that required the actual loading of that vessel before it was possible to know the amount sold under the contract. That custom was well known on the coast. That custom means to give the vessel a full cargo. The 15% is an estimate that her capacity will be within that 15%, but if that estimate were not used at all it would mean the same thing, a full and complete cargo for the vessel. Where there is a cargo sale to a named vessel, and it contains the expression "15% more or less to suit the capacity of the vessel," in addition to an estimated number of feet, it is the custom to load the vessel. [181—114] That determination cannot be arrived at before the vessel is loaded. I would say that it is not possible to load on to barges the amount of lumber sold as the capacity of a named ship, unless you know what the ship's capacity is. A ship's capacity does not always remain the same, the loading capacity changes on the same ship. A ship changes its loading capacity when it loads the same commodity, such as lumber. The reason for that is because of the different seasons of the year; she will load probably three or four per cent more in summer than she will in winter. There is another reason; some lumber is heavier than other, what I mean by that

(Testimony of A. A. Baxter.)

is that some is a close-grained, heavy lumber, the logs of which float deep in the water, because they come from the butt of the tree; others come from the top of the tree and will float much higher out of the water. If cargo is cut largely from those light logs the vessel will carry more, if it is cut largely from the butt logs she will carry less, even in the same month of loading. The height of the deckload affects the question of her carrying capacity, and in a schooner of this type, or a vessel of this type such as the "Marston," the height of the deckload affects the question of her carrying capacity very materially. The captain, plus the marine surveyor, has control over the loading of a cargo to a ship's capacity. If there is a difference of opinion the captain can say "I am loaded" and the marine surveyor cannot compel him to take more, but the captain can ask for more and the marine surveyor can deny him more; that refers to the height of the deckload.

This is a contract for a named vessel. There are benefits accruing to the seller of lumber under a contract such as the one in suit, where a vessel is named, and where it is for a cargo to suit the capacity of that vessel, and where there is a delivery date extending over a period of ninety days. Those benefits are [182—115] several in number. First, and in this case, that it would assure us that the cargo was to be exported; second, it would permit us, through the shipping papers, to keep track of the vessel's movements and know approximately when

(Testimony of A. A. Baxter.)

she would arrive. Third, the vessel being named would give us some idea of the cargo required, the quantity of cargo required, and that would be particularly so had the vessel loaded cargoes of lumber before. The naming of the vessel would also decrease the buyer's opportunity to speculate on the 15 per cent more if the price went up, or 15 per cent less if the price went down. The trade papers I have spoken of are shipping papers. They give the position of the vessel on any given day, how many days she is out from one port to another port, or that she is in such a port. Contracts of this character, where the delivery date extends over a period of 90 days, give us the means of knowing in advance when the mill will be called upon to cut the lumber, and we instruct the mill. The mill does not keep track of it. It gives us that advantage. We did not commence to cut this lumber in accordance with the specifications on the 1st day of October because the position of the vessel was such that we did not think she would make her loading date. When we got the specifications from the plaintiff, we had no knowledge as to when we would be required to cut that lumber, but we thought if she arrived at all it would be very late in December. We had no knowledge as to when the boat would arrive; we thought at that time that the vessel would not arrive, but we did know that plaintiff had furnished us with specifications and asked us to cut the lumber. When they furnish you with the specifications, that is equivalent to asking you

(Testimony of A. A. Baxter.)

to cut the lumber at a particular time, that is your authority to go ahead and cut the lumber, but they have no discretion as to what date we shall commence, that is up to us. When these specifications were handed to me on September [183—116] 19th, I knew exactly where the "W. H. Marston" was. I knew where the papers reported her to be, so many days out from the Columbia River, bound for Melbourne. That is reliable information and is so considered by the shipping trade. After September 19th there came a time when I knew that the "W. H. Marston" could not make her loading date. When I say "I knew," I knew it became a practical impossibility. When I had knowledge that it had become practically impossible, I still had time to cut the lumber and have it ready to load the vessel should she reach the mill dock by December 31, because the contract gave us the option to deliver f. a. s. mill wharf within reach of ship's tackles, and also on barge alongside of the vessel at the mill wharf. Therefore, we could draw it from two or three, or, if necessary, more mills, if she arrived at a later date. I had the power to have this lumber cut by more mills than one. We were not obligated and tied to the Knappton Mills & Lumber Co. We could have assigned a part of it—had the vessel been dropping in on us and had we been facing demurrage, we could and would have assigned part of it to other mills. We could have loaded in this optional way from the mill dock and from barges also. That would have expedited the loading. The pur-

(Testimony of A. A. Baxter.)

pose of putting that optional method in our contract of loading a vessel is that the men want us to take care of certain of our mills where they have not deep water at the wharf, or where they have no wharves at all. That is the main object, but in addition to that it enables us to get out, when we get caught by a vessel arriving earlier than we anticipated, then we can bring lumber from two or three other mills and deliver it alongside on a barge. I know of my own knowledge the thing that made it practically impossible for the "W. H. Marston" to make December loading date. This was permitting the vessel to change from returning in ballast to returning in cargo. I knew that she was on the way in a cargo of lumber from Astoria to Melbourne. I knew that she was to return [184—117] after that in ballast to the Columbia River to load our cargo. The charter provision was changed to permit her to return in cargo. That is not all I know about it. I was approached by Mr. Comyn, on the floor of the Merchants Exchange, to extend the date of loading that vessel. He told me they could get some considerable amount for extending the time, he thought about \$5,000, and intimated that some portion of that could be given to me, that is, to the Douglas Fir Company; I had no intention of intimating that it was intended as a bribe. He told me that he was offered something for the privilege of coming back in cargo. At that time they spoke of coming back via the South Sea Islands, in copra—no, bringing copra back as part of the cargo,

(Testimony of A. A. Baxter.)

but I am not sure that it was via the South Sea Islands, because the copra might have been taken over in small vessels, but it was to bring the vessel back in cargo. It might be copra, or it might be wheat. I objected to it. I don't remember the date of that conversation. Mr. Daly, then associated as the manager, I think, of the Australian Department of Comyn & Mackall, came to my office and offered me \$2,500. When I say "offered me," I mean to the company. Offered to the company \$2,500 to extend the loading date so as to take that vessel when she arrived, telling me that they had got \$5,000 from the owner of the vessel for permitting him to change that clause in the charter-party that required the vessel to return in ballast, and now permitting her to return in cargo. I declined it. I said to him then, that as they had taken this consideration, changing the charter-party, they put themselves in the same position that the ship was; in other words, they were speculating; if she arrived in December, even on the last day of December, we would commence to load her at \$9.50; if she arrived at a later date we would still be glad to load her, but at our then price for January, February, March, as we did not anticipate she would be later than March. My recollection [185—118] now is that that price was \$22.50 base. That was the end of the conversation. I cannot fix the date when I learned that it was practically impossible for this vessel to make her loading date, but it was when I learned that her charter-party had been changed so as to permit her

(Testimony of A. A. Baxter.)

to return in cargo. She had to load cargo at one end and discharge it at the other. The "William Bowden" was one of the unnamed, or one of the to-be-named vessels in the contract. The "Golden Shore" was one of the to-be-named vessels in the contract. I required of Comyn & Mackall an addition over the agreed \$9.50 base for the "William Bowden's" cargo, because I had sold him two cargoes for vessels that were named, and 1,450,000, 15 per cent more or less, for two vessels unnamed, that was the combined capacity of the two vessels to be named. When he named the two vessels, their capacity was greater than 1,450,000 plus 15 per cent, and it was therefore mutually agreed that he should pay us our then current price for the excess above 1450 M plus the 15%. If the "William Bowden" and the "Golden Shore" had been named in the contract, and their estimated cargo had been fixed at 1450 M feet combined, I would not have demanded the current rate of the combined cargoes then exceeding 15% because the vessels having been named in the contract I would feel under an obligation to give them a full cargo and consider the contract filled, regardless of whether it exceeded or was below the amount estimated, even if it exceeded the 15%. [186—119]

Testimony of A. G. Harms, for Defendant.

A. G. HARMS was called as a witness on behalf of the defendant, and being first duly sworn testified as follows:

Direct Examination.

I reside in San Francisco. My present occupation

(Testimony of A. G. Harms.)

is that of vice-president of Pope & Talbot, a corporation. I have been vice-president of that company for about a year and a half. My position with them before that time was Secretary for a good many years prior to that. Pope & Talbot's business is principally lumber and shipping. I believe that they advertise that they have carried on that business since 1853. We have mills situated on Puget Sound in the State of Washington, at Port Gamble and Port Ludlow. We manufacture approximately 100,000,000 feet a year. Our Company is also engaged in chartering vessels and in the shipping business. I have been personally familiar with the lumber and shipping business of Pope & Talbot during my career as secretary and as vice-president of that corporation.

The trade term "f. a. s." is generally understood to mean free alongside vessel, within reach of ship's tackles. Where a contract is made for the sale of lumber to be carried by a named vessel, with a definite period of loading fixed, there is a custom with regard to the requirement or nonrequirement of the presence of the named vessel at the loading port during the agreed loading period. It is understood that the vessel must be there within the time specified in the contract. That is absolutely a general custom of the trade. There is no custom of the trade by which the buyer can present his vessel at a time after the loading period unless the contract is modified. I never heard of any such custom unless it is mutually agreed upon. There is no custom

(Testimony of A. G. Harms.)

permitting the delivery of lumber within the agreed loading period to barges, instead of to the named vessel. I never heard of lumber being delivered to barges instead of to the named vessel under [187—120] such contracts. My testimony in regard to this custom applies to the end of the year 1916 as well as to the present time. The custom with regard to cutting the lumber for the named sailing vessel in such a contract is that the mill agreeing to furnish the order follows the position of the vessel and regulates the commencement of the preparation of the cargo according to the position of the vessel. In the case of the sale of a cargo of, say, 1,300,000 feet of lumber for export shipment, 15 per cent more or less to suit the capacity of the vessel, the amount of the sale is not determined, that is, the exact amount is never determined until the vessel has completed her loading. That is the custom.

Cross-examination.

One of the heads of Pope & Talbot, besides myself, is Mr. W. H. Talbot, who is the president. Mr. Talbot is an officer of the Douglas Fir Exploitation & Export Company. He is president of that company, too. He is president both for the concern that I work for and of the defendant here. I recall that in the fall of 1916 the Douglas Fir Exploitation & Export Company became active in operation. Prior to the month of October, 1916, it was not the custom of the lumber trade here to load sailing vessels that had been named for cargoes

(Testimony of A. G. Harms.)

and arrived late unless it was mutually agreed. It was not the custom to load them late unless the contract had been modified to that extent. I am pretty familiar with the transactions of Pope & Talbot in the first nine months of 1916 and for the years prior thereto. I cannot recall any specific case prior to October, 1916, in which Pope & Talbot Mills, as an accommodation to a buyer and without any further consideration from the buyer, agreed to or did load a sailing vessel after her loading date. I cannot recall either any specific case where they refused to load a sailing vessel which could not make her loading date with a cargo that had been specified for that sailing vessel. [188—121] I cannot recall any such particular instance. It would be an approximation, but I should say that in the year 1915 Pope & Talbot shipped between 40,000,000 and 50,000,000 feet of lumber that was exported. The average cargo would vary. Some of them carry a little less than a million feet, and some probably two million feet. I cannot name any specific case right now, during the entire period of my connection with Pope & Talbot, in which they refused to load a sailing vessel that arrived late without a special agreement to that effect. I would say that the percentage of sailing vessels which failed to make their loading date is very small. I would not even approximate what it is. It does not happen often. It happens very seldom. It is a little more difficult to approximate the arrival of a sailing vessel a year in advance at a given load-

(Testimony of A. G. Harms.)

ing port than it would be if it were within six months. It is a matter that depends on weather conditions. Six months would be a reasonable period to approximate the arrival of a vessel. If we had six months in advance we could tell within ninety days of the date a vessel would make her loading date. If it were nine months in advance, it would be just a little more difficult, and if it were 12 months in advance it would be still more difficult, and 15 months in advance would be still more difficult.

Q. Would you say that the average shipping man can with any degree of certainty tell whether or not a vessel will make a loading date 15 months ahead?

A. It has been our experience and our judgment never to attempt to estimate that so far ahead. We know that they were doing it, but we were not even attempting it.

WITNESS.—(Continuing.) We did not attempt it because we consider it in the nature of speculative business, and we did not indulge in speculative business. We would not name a vessel 15 months [189—122] ahead because it is a matter of speculation. It is selling in advance of the market too far. You could not name a vessel and know with any degree of certainty that she was going to arrive at a certain date, say 15 months ahead. I don't think it could be done with any degree of certainty, even though you had a leeway, say, of three months; you ought to be able to approximate it but there would be no certainty. She might arrive earlier

(Testimony of A. G. Harms.)

or she might arrive later than the three months. You could not tell 15 months in advance whether a sailing vessel would arrive within a period of ninety days.

Redirect Examination.

If a vessel were fixed under different charter-parties over the periods in question, it would give you something to work upon that would be a little more specific and definite. [190—123]

Testimony of W. C. Ball, for Defendant.

W. C. BALL was called as a witness on behalf of the defendant, and being first duly sworn testified as follows:

Direct Examination.

I reside in Oakland, California. My present occupation is sales manager of Charles R. McCormick & Co. I have held that position for approximately six years. The business of Charles R. McCormick & Co. is wholesale lumber and shipping. I believe that they have been engaged in that business about 13 or 14 years. I am familiar with both the lumber and the shipping ends of that business.

The meaning of the trade term "f. a. s." is free alongside; free alongside vessels, or according to the terms of the contract, whatever it said. The Charles R. McCormick Co. operate three mills, all of them situated at St. Helens, Oregon. With regard to the approximate amount of business that these mills do each year, they are at the present time cutting 650,000 feet a day; it varies according

(Testimony of W. C. Ball.)

to the amount of business, and how many ships we operate. It would be, approximately, 200,000,000 feet a year. In the case of a sale of export lumber to be carried by a named vessel within a definite loading period fixed by the contract, there is a custom in regard to requiring the named vessel to be present within the loading period; that is that the vessel named load the material under the contract within the time specified. That is a general custom of the trade. There is no custom of the trade respecting permitting that vessel to take her cargo if she arrives after the loading period has expired. I never heard of any such custom. There is no custom permitting barges to take such cargoes in place of the named vessel within the loading period. In case of a sale of a cargo of lumber of, say, 1,300,000 feet, 15% more or less to suit the capacity of the vessel, the amount of lumber sold is determined, I would say, after the vessel [191—124] has been loaded. That is the custom of the trade so far as I understand it.

Cross-examination.

The percentage of our business which is domestic and the percentage which is export depends entirely on the demand. We have at times as high, probably, as 20 per cent, and sometimes not 5 per cent. I could not say right offhand, without looking up the record how much export business we were doing in 1916. We were doing a fair amount. We did considerable export business before the organization of the Douglas Fir Exploitation & Ex-

(Testimony of W. C. Ball.)

port Company. We did this business from the time that the St. Helens Mill was first put into operation. I would not be able to say without looking up the records how much export business we did in the year 1915, but we have done considerable. We handled a good many export cargoes, and handled a good many contracts where the vessel was named. I believe that we have handled cases where the vessel was not named in the origin of the contract. I have known of cases where the vessel was named before.

Q. You say that where a sailing vessel did not make the loading date, and I am talking now of the period prior to the organization of the Douglas Fir,—do you remember when that was? I will give you the date. It commenced operating about October or November, 1916. Now, prior to that date you say it was the custom that if a sailing vessel could not make her loading date she would not be loaded?

A. I don't remember answering the question exactly in those words.

WITNESS.—(Continuing.) With regard to whether or not it was the custom not to load a sailing vessel that could not make her loading date without some special compensation or special consideration from the buyer to the seller, I would say that each individual case [192—125] is governed by arrangements made between the buyer and the seller. I haven't any recollection of being a party to instances where, without any further modification of the contract than an extension of the time, a

(Testimony of W. C. Ball.)

mill would extend the loading date for a sailing vessel that could not make the loading date. I have no recollection of such a thing ever happening in any business that I had anything to do with. In my experience, I do not know of any instance where a mill refused to extend the loading date for a vessel that was late. With regard to this custom, I am speaking just from my own experience. I do not know of a case where a late sailing vessel's loading time or loading date was extended. I do not know of any case where a mill refused to extend it. Our mills are in the Douglas Fir Exploitation & Export Company. Our vice-president is a director or trustee of the defendant here. With regard to whether or not I am interested in the outcome of this controversy, I personally did not know of it until I was called upon. Now that I do know about it, I am not interested in the outcome. It is immaterial to me which side prevails. It is immaterial to me whether the Douglas Fir, of which we are a member, or their opponents, Comyn & Mackall, prevail. Whatever interest our firm has in the Douglas Fir Exploitation & Export Company is financial. I am not familiar with what their interest is. Whatever it is, I am not familiar with their contract.

Redirect Examination.

My testimony with regard to the customs I have testified to applies equally to the year 1916 as well as to the present time. With regard to whether it applies to domestic shipments as well as to export

(Testimony of W. C. Ball.)

shipments, I can't recollect each and every question asked me.

Q. I mean the custom in regard to the named vessel is the same with reference to domestic shipments as it is with reference [193—126] to export shipments, if a vessel is named?

A. If a vessel is named you are supposed to load your lumber on the vessel named.

The COURT.—Q. As you understand it, was there a custom in 1916 by which, where there was a named vessel, the buyer would be relieved from making delivery if another vessel was tendered?

A. The custom, as I understand it, was that when a vessel was named to load a cargo within a certain time, that that cargo must be loaded on that vessel unless there was some other agreement made between the buyer and the seller.

Q. And if the vessel, itself, was not presented within the loading date, the buyer would be relieved from the responsibility; is that the idea?

A. That is my understanding.

Mr. DERBY.—Excuse me, your Honor, didn't your Honor mean the seller?

The COURT.—Yes, I mean the seller.

Q. The seller would be relieved from liability under the contract?

A. If the vessel did not arrive within the time.

Mr. SUTRO.—Q. Mr. Ball, suppose the vessel was lost.

A. From what little I know of it, that would be a legal matter, as to whether or not the buyer could

(Testimony of W. C. Ball.)

comply with his contract; if the vessel was lost, it would be impossible to deliver the vessel there then.

WITNESS.—(Continuing.) If it were impossible to furnish the vessel within the time specified for her loading date and if that cargo had been cut, my understanding of the custom in 1916 is that if the vessel did not arrive because of conditions beyond the control of the buyer, within the time specified, there would [194—127] be some mutual understanding regarding that cargo. There was no custom on the subject if it was beyond the control of the buyer. [195—128]

Testimony of John B. Blair, for Defendant.

JOHN B. BLAIR was called as a witness on behalf of defendant, and being first duly sworn, testified as follows:

I am general manager of J. J. Moore & Co., a corporation. The company is in the business of exporters and importers. They have been engaged in the export business about thirty years. They export lumber. They are also charterers of ships. They own ships. I have been connected with J. J. Moore & Co. for twenty years, and am now the general manager. I am familiar with the trade terms that are used in export contracts of lumber. "F. a. s." would be such a term. In a contract for the sale of a cargo of lumber for export on a named vessel, "f. a. s." in such a contract means free alongside the named vessel. I do not know whether there is a custom known to the trade relative to the

(Testimony of John B. Blair.)

method and the time of ascertaining the amount of the cargo sold. In contracts such as you have spoken of, I think the amount carried by the vessel would determine the amount of the contract. That determination is made after she is loaded. I believe that is the custom. That is the custom, so far as I have dealt on this coast in such contracts. My dealings have been along this coast for twenty years. I remember the charter by J. J. Moore & Co. for the sailing vessel or schooner "W. H. Marston." That was in my time. I recognize the document you show me as being the charter of the "Marston," and that charter calls for a voyage from the Columbia or Willamette Rivers, or on Puget Sound to Sydney or Melbourne, wharf, or Port Adelaide, or Newcastle, New South Wales. The date of the charter is April 11, 1916. Thence to the usual safe landing place on the Willamette or Columbia Rivers, or on Puget Sound, I mean to load at those ports to Australia. That is the voyage which this charter covers, and only that. We do not have a subsequent charter of the "Marston." We had a previous charter. Prior to entering into this charter it was stipulated that the "Marston" would proceed to Puget Sound and load under this charter. [196—129] I do not remember the exact date at which that charter was assigned to Comyn, Mackall & Co., but it was while she was on the voyage previous to this, carrying a cargo of lumber to Australia. The voyage that was assigned under that charter-party to Comyn, Mackall & Co. was assigned after her

(Testimony of John B. Blair.)

return from Australia in ballast, and she was then to load lumber at Columbia or Willamette Rivers, or Puget Sound, to Australia. J. J. Moore & Co. as charterer owned the chartered vessel on return from the Australian port to this coast in ballast. When we rechartered her, I do not remember the exact date, this whole charter was then endorsed by me over to Comyn, Mackall & Co., and all rights thereunder transferred to them. I do not remember the date. Upon the return of the vessel from the port at Melbourne to the Columbia River, she came back carrying a cargo, and the charter-party provided that she should come back in ballast. I remember the transaction that resulted in the vessel carrying the cargo back instead of coming back in ballast. The owner of the vessel was desirous of bringing a cargo of wheat from Melbourne to this coast. That owner was Mr. Harry Pennell of Portland, and he wrote me that inasmuch as the charter provided that she must return in ballast he must have the charterer's permission before he could deviate from this charter. Knowing that the vessel had been rechartered by me in the meantime, he asked me if I would get such permission. He wrote that it might cost him something, and would I commence negotiations and see what the cost of arranging for a wheat cargo would be. I then passed letters with him, which I communicated to Comyn, Mackall & Co., and the privilege of loading wheat was finally given the owner on the payment of a certain sum, \$5,000 I think it was. I don't remem-

(Testimony of John B. Blair.)

ber what that date was. I don't remember the date of the change in the charter. That is all covered by correspondence in my office. I never offered the Douglas Fir Exploitation & Export Company, the defendant in this [197—130] case, the sum of \$2,500 for J. J. Moore & Co., or any other sum, for the privilege of extending the "W. H. Marston" loading date under a contract which Comyn, Mackall & Co. had at the time with the Douglas Fir Exploitation & Export Company. I never had any negotiations with the Douglas Fir & Exploitation Company on my own behalf or on behalf of J. J. Moore & Co., or on behalf of Comyn, Mackall & Co., with reference to the extension of the loading date of the "W. H. Marston" under the contract mentioned. Mr. J. Claude Daly is in our employ now. He is the gentleman who at one time was in the employ of Comyn, Mackall & Co. He left their office to come to ours after he had resigned from Comyn, Mackall.

Cross-examination.

The amount of cargo carried by a named vessel will determine the amount due under the contract.

Mr. SUTRO.—Q. I will state the question over again, so there will be no doubt about it. If there is a cargo of lumber bought, which names a vessel, specifies the quantity, and 15% more or less, and says, "To suit capacity of vessel," and the quantity was, say, a million feet specified, and the vessel's name, and the clause in the contract, "15% more or less to suit the capacity of the vessel," and that the

(Testimony of John B. Blair.)

capacity of the vessel is 50% more than a million feet, what do you understand from the custom is the obligation of the seller with respect to delivering the excess amount of lumber?

A. I cannot conceive of a contract for a named vessel and likewise a specific quantity at the same time.

Q. Now, if I understand you, Mr. Blair, when you have a specific quantity, 15% more or less, you ordinarily don't have the name of the vessel: Is that correct?

A. If the purchase is for a million feet, 15% more or less, and the vessel is named afterwards, and the vessel is subject to a million feet, 15% more or less—

Q. (Intg.) The vessel in such a case as that becomes an incident, doesn't it, and the quantity becomes the controlling factor: Isn't that so?

A. Yes.

Redirect Examination.

The purpose of placing in an f. a. s. contract, where the vessel is named, and where there is inserted this million feet 15% more or less to suit the capacity of the vessel, of putting in a million feet, is that if the contract is first for the named vessel, the quantity stated is explanatory. It gives the mill the range the [198—131] vessel will come in, 15% less than the quantity, or 15% more. I have never heard of a case where the range or limitation of 15% is exceeded in the actual loading of the vessel where the vessel is named, and then the

(Testimony of John B. Blair.)

explanatory amount of 15% more or less is exceeded, without making a new contract on the excess.

Mr. McCLANAHAN.—Q. I mean when the parties get together and make their contract for a cargo, for a named vessel, and they put in there, a million feet, 15% more or less, have you ever heard of a case where in the loading of the vessel the actual loading exceeded the 15% more than the million feet?

A. I don't quite understand you. You say where a named vessel—

The COURT.—Q. And where the quantity of lumber is stated and then there is a range of 15%, counsel wants to know whether you ever knew of a case where the excess exceeded the 15%?

A. Yes, we have had vessels where they ran over the 15%.

WITNESS.—(Continuing.) The purpose of putting into a contract for the named vessel the 1,000,000 feet 15% more or less to suit the capacity of the vessel, is so the mill may know how much lumber they are called upon to furnish. Under such a contract the sale is for a definite number of feet that the vessel will carry within the limits of the 15% more or less. That is in contracts which call for a cargo for a named vessel. It is the mill which, in making an f. a. s. cargo contract for a named vessel, inserts in the contract the definite number of feet with the limitation. In sales for a definite number of feet of lumber, and without any reference to whether it is a cargo or not, as a custom we insert in the contract 15% more or less. This is on a defi-

(Testimony of John B. Blair.)

nite number of feet and without any reference to a cargo. We do that because on a stated amount you might determine that you might want to take advantage of a greater quantity than a vessel carries. In a contract for the sale of a [199—132] definite number of feet of lumber, and without any reference to any ship, it is necessary to put in that contract 1,300,000 feet, 15% more or less. The 15% more or less is put in because you may not be able to get vessels.

**Testimony of A. A. Baxter, for Defendant
(Recalled).**

A. A. BAXTER was recalled as a witness on behalf of the defendant, and having been previously duly sworn, testified as follows:

The "Bowden" was not furnished with a cargo, because she did not arrive at the mill within the loading date provided for in the contract. The "Marston" was not furnished with a cargo for the same reason. Between the dates of October 1st and December 31st, 1917, it was at no time possible for the defendant to tender to the schooner "W. H. Marston" a cargo at the mill wharf free alongside that vessel, or free on board the mill wharf within reach of that vessel's tackles, or on barges at that vessel's tackles at said mill wharf. In f. a. s. cargo contracts there is inserted a definite number of feet with the expression 15% more or less to suit capacity of vessel, to allow a leeway that is estimated sufficient to load the vessel that may later be named. The estimate is determined by the parties as a mutual

(Testimony of A. A. Baxter.)

agreement between buyer and seller. With regard to where they obtain the information as to the estimate, I think it is entirely speculation. For instance, a buyer might look over the shipping papers and see that there are twenty-five vessels inward bound. Their tonnage is such as to indicate that a cargo of 2,000,000 feet would suit the capacity of those vessels nearer than either a larger cargo or a smaller cargo. They would be very apt to decide on 2,000,000 feet. If there was more tonnage apparently available for the time of loading required of, say, 1,000,000 feet, they would be more likely to arrive at 1,000,000 feet. They gain this information from trade journals. But in selling the cargo, and I speak now for myself, I would sell it either a million or a [200—133] million and a half, or two million, or three million, if he wanted it at any particular time. We would meet their requirements. The naming of the definite number of feet is an approximation of the cargo that the parties make themselves. I do not know of a custom with reference to contracts, where delivery is to be made to barges, of inserting "15% more or less." In an f. a. s. contract "B. M." means board measure. The expression "15% more or less to suit the capacity of the vessel" means to give the vessel a full and complete cargo. I know how much cargo was loaded on the "W. H. Talbot," and I have the figures in my pocket—971,972 feet, board measure. That was the amount which was paid for under this contract. The contract was for 1,000,000 feet, 15% more or less to suit the capacity

(Testimony of A. A. Baxter.)

of the vessel. Delivery of lumber to a barge is not delivery to a ship for export lumber.

The COURT.—Q. Suppose the lumber was delivered on a barge and then taken right out and put aboard a ship for export, then it would be for export, wouldn't it?

A. Yes.

The COURT.—I thought you did not mean just exactly what you said. You asked him, Mr. McClanahan, if the delivery of lumber on a barge would be a delivery for export, and he simply answered "No."

Mr. McCLANAHAN.—If the Court please, I am asked a question that is provided by the evidence in here covered by the "G" list. The "G" list states on its face to be a price list of cargoes for Douglas Fir to be delivered to a ship for export shipment. My question relates to that entirely.

The COURT.—Ask him again, and let him answer it. Maybe I misunderstood him.

Mr. McCLANAHAN.—Q. Would delivery on a barge be a delivery to a ship for export shipment, as provided by "G" list?

A. No. [201—134]

Cross-examination.

It is customary in some small percentage of cases to load lumber on to barges for export. It is not customary to make contracts which provide for delivery to barges. I know of no contracts which provide that a given quantity of export lumber should be delivered to barges 15% more or less. I can ex-

(Testimony of A. A. Baxter.)

plain to the Court's entire satisfaction my testimony five minutes ago, where there is no custom with reference to delivery of lumber to barges 15% more or less, unless the lumber is to be exported. The questions were asked in such a way that one cannot answer either yes or no and fully explain the situation. Now, I will explain it. I am asked the question, first, do we make delivery on barges for export. I say no. We make a contract to deliver lumber for export free alongside the ship, within reach of her tackles, that is, within 70 feet of her, and at our option, on the wharf or on barge. The title to that lumber passes when the lumber goes into the ship's slings, whether it is from the wharf or from a barge. Now, if we put it on a barge we insure it; if it is lost before it goes into the ship's slings, the insurance company pays for it. They have a blanket policy. If it goes into the ship's slings, and the ship should be burned while she is half loaded, the buyer has it insured. As it goes in the ship's slings, the buyer's insurance takes effect and ours ceases. That will explain the situation. It has not passed us until it is in the ship's slings, it is our lumber.

The COURT.—Q. It is your lumber while it is on the barges?

A. It is our lumber while it is on the barge. And if the barge lying alongside the ship has discharged one-half of the bargeload, and the barge is swamped and lost, it is our lumber and our insurance protects it.

(Testimony of A. A. Baxter.)

Mr. SUTRO.—Q. You have testified here this afternoon to a great many customs; one of the customs you have testified to related [202—135] to the delivery of a specific quantity of lumber, 15% more or less, to barges. Now, Mr. Reporter, will you turn to page 322 of your notes and read the question and answer there. I want to get the exact words of the question and answer.

(Thereupon the record was read as follows:)

“Q. Is there a custom with reference to contracts where delivery is to be made to barges to insert ‘15% more or less’? Is there such a custom?

A. Not that I know of.”

Q. (Continuing.) You were asked was there a custom where delivery was made to barges to insert “15% more or less,” and you say there is no such custom.

A. I say no.

WITNESS.—(Continuing.) There is no custom to make contracts for delivery for a specific quantity of lumber to barges. There is no custom, where delivery is provided for to barges, of inserting “15% more or less,” because we do not load vessels in that way.

(The record was here re-read.)

Mr. SUTRO.—Q. You answered that question “no.” You said that where delivery is provided for to be made to barges it is not customary to insert “15% more or less”; didn’t you say that?

A. He asked me the other way around, and I said “No.” I don’t know of any contracts made for delivery to barges.

(Testimony of A. A. Baxter.)

WITNESS.—(Continuing.) That is so, whether you put in 15% more or less or not. We do not make any contracts for export for delivery to barges, but we do make contracts for export and reserve to ourselves the right and privilege of moving some portion of that from the mill by barge to the vessel. We do not make contracts for barges at all, except at our option, to deliver some portion by barges. We do not make a contract for delivery of export lumber to barges. There is no custom on the subject that I know of, and there is no custom with [203—136] reference to delivering to barges at all, whether you add 15% more or less or not.

We were furnished with the specifications for the "Marston." If the "Marston" had put into port to take her loading, upon cutting these specifications as they were furnished to us, we as the seller would have complied with our obligations if the "Marston" had been there and we had cut to the specifications. These specifications did not tell us just how much lumber to cut. Supposing that the "Marston" had put into port to take her loading, we would not have cut 1,300,000 feet. We would cut 1,300,000 feet, less about 15% or perhaps 20%, to keep well within her carrying capacity. We would generally keep below what we thought was the carrying capacity of the vessel so as to have nothing left on hand when the vessel was loaded. I know, as a matter of fact, that she carried within one per cent of 1300 M feet four months afterwards, but I could not know it before. 1300 M feet was a pretty close guess. It is very

(Testimony of A. A. Baxter.)

easy to take these specifications and tell you what the cost of them would be on a \$9.50 base, and what it would be on a \$22.50 base. Any clerk can do that. I would be pleased to have that computation made for you. I will take these specifications and give you the cost of them on a \$9.50 base and on a \$22.50 base.

Q. I will not ask you to do it now, but you will have it done, won't you?

Mr. McCLANAHAN.—We will accept your figures on that basis.

Mr. SUTRO.—Those are the figures that we have given you. That will be satisfactory to us. Mr. Baxter can check it. We will leave it that way and see if he gets a different figure.

WITNESS.—(Continuing.) The term “f. a. s.” means free alongside, within reach of vessel's tackle. In the memorandum which relates to the proposed cargo, one of the four cargoes here, the term f. a. s.” there, mill wharf, means free alongside within reach of [204—137] the ship's tackle. “F. a. s. mill wharf” there means that the lumber was to be put free alongside on the mill wharf, but not only on the mill wharf, within reach of ship's tackle. With regard to whether it is a price term, it is in the list. With regard to whether it is one of the terms of the price, it is a condition of the sale of the list. It is on page 2 of the “G” list, “f. a. s.,” free alongside, within reach of ship's tackle. [205—137a]

Mr. SUTRO.—Q. I want to show you your price

(Testimony of A. A. Baxter.)

circular of May 24, 1917, and call your attention to the opening sentence:

“Prices delivery free alongside wharf and/or on mill’s option on barge.”

A. Yes.

Q. All within reach of ship’s tackle?

A. Yes.

WITNESS.—(Continuing.) That correctly defines the term “f. a. s.,” and the actual letters “f. a. s.” are free alongside, those three letters standing by themselves, but the sentence is not full. The words “free alongside” in this price circular of date May 24, 1917, standing by themselves, correspond to the abbreviation “f. a. s.,” but the abbreviation is not complete with the “within reach of ship’s tackle.” The list says so. In this price circular the words “free alongside” correspond to the letters “f. a. s.” After the “Marston” was named to carry this lumber, there came a time when we suspected or questioned whether she could make her loading date, and then there came a time when we became certain that she would not make her loading date; in other words, there was a period of time when there was some question in our minds as to whether she would make the loading date or not, and then there came a time when, so far as we could know, she could not make her loading date. There was a time when I felt confident that she could not. I would not say that I knew that she could not, but that it was improbable, when as a practical shipping man I knew she could not make her loading date. It would have

(Testimony of A. A. Baxter.)

been a miracle for her to do so. I would say that the time necessary for a sailing vessel to make a loading date in December, 1917, from Melbourne, would be about 100 to 120 days, as they vary from 100 to 120 days for the voyage.

Mr. SUTRO.—Q. In order to see if we can get down to some dates on this thing, on September 19, 1917, the plaintiff here sent you [206—138] these specifications, and on September 20, 1917, which would be within about ten days of the end of September, you wrote them, “The vessel’s position to-day, as reported in the ‘Guide,’ is 96 days out from Columbia River for Melbourne; even should she arrive there, she would have very little chance of discharging her cargo and returning to the Columbia River in time to commence loading in December.” At that time would you say that you knew practically that she could not make her loading date?

A. No, not at that time, but I thought it was doubtful at that time.

WITNESS.—(Continuing.) At that time it was beginning to be very doubtful, but it was not the period of certainty that had been reached.

Mr. SUTRO.—Q. Now, on October 1st you wrote: “We beg to advise that this order was sold for shipment by the ‘Marston’ loading date October to December, and we cannot see our way clear to consent to the change you request, namely, to deliver to a barge.” Now, that was within 91 days of the end of the loading period. Were you then certain that she could not reach her loading port?

(Testimony of A. A. Baxter.)

A. Was that on October 1?

Q. Yes.

A. She had not arrived yet. She arrived, I think, on October 4. Yes, I was reasonably sure that she could not make it.

Q. Had you then reached that degree of certainty that you have talked about here?

A. No, not positive.

WITNESS.—(Continuing.) I said on an average a voyage would take from 110 to 120 days to make that trip. When you have a period of ninety days, you do not know that she cannot make her loading date, because there is a difference between an average voyage and the time that the sailing vessel will do it. I think sailing vessels have [207—139] made the voyage in about sixty-five days, but it is an unusual thing. On October 1st she was three days out from Melbourne, but we did not know that on October 1st. She might have been thirty days out. We were watching the "Guide," but we knew nothing about it until she arrived, and we could not know when she would arrive. On October 12, 1917, we said, "We stand ready to carry out our contract, but will decline to change in the manner you suggest." On October 12th we knew as a reasonable certainty that she could not make her loading date. We felt reasonably sure that she could not make it at that time. At that date, as I recollect it now—it is three years ago—I had reached that degree of certainty which I have told you about. October 12th was 78 days from the end of December.

(Testimony of A. A. Baxter.)

I was reasonably sure on October 12th that she could not make her loading date. I knew it very nearly as well as I ever did. I reached this degree of certainty that I talked about this morning when I learned that the vessel was to carry return cargo. I surmised and believed she could not make the loading date before that date, but that sealed it absolutely. October 12th did not seal it, but it made it pretty certain.

Mr. SUTRO.—Q. As a matter of fact, you knew on September 20th that she could not make her loading date, and you so wrote the plaintiff, didn't you? You so told the plaintiff?

A. I do not think so. I have no such recollection. But I knew at that time that she was getting doubtful; her position was such as to indicate doubt as to whether she would make it or not.

WITNESS.—(Continuing.) If my letter is there to that effect, I did write to the plaintiff that she would have very little chance of discharging her cargo and returning to Columbia River on September 20th. I cannot remember all those letters. I mean to tell you that, having written on September 20th that she would have very little chance, I did not know more than three weeks later that she [208—140] could not make the date. I could not tell three weeks later because of the uncertainty of knowing as to a sailing vessel. They make a voyage sometimes from here to Puget Sound in four and one-half days, and at other times, 16 and 18 and 20 days. In all my experience I have known a sail-

(Testimony of A. A. Baxter.)

ing vessel to make the voyage from Melbourne to the Columbia River in seventy-three days. They have made it in less than sixty-five days. It is in the records of the Merchants Exchange that a ship like the "Marston" has made it in less than sixty-five days. I wrote to the plaintiff on October 17th and on the previous dates you have read to me, letters which practically indicated to them that I would not deliver this cargo because they could not have the "Marston" there in time, because one vessel out of perhaps several hundred has made the voyage in sixty-five days, and the average, I would say, is 110 to 120 days. It isn't for me to account for that. It is a matter of record. I do not remember when I had this talk with Mr. Comyn on the floor of the Exchange. I could not remember the date. It was before I had reached this degree of certainty. I do not know how long before, but it must have been before. I do not know whether it was a day or a couple of weeks. I could not go into that. That is three years ago. I cannot remember about the time. I remember the conversation very distinctly. I remember very clearly that the place was the Merchants Exchange, and I am very sure that it was Mr. Comyn. I think that it was probably in the month of September. He intimated to me that they could pay me a consideration for extending the loading period of the "Marston." He told me that she was chartered to return in ballast, that the owners wanted to change that clause in the charter-party, and have the option of bringing back a cargo,

(Testimony of A. A. Baxter.)

and I distinctly remember he mentioned copra as a partial cargo, or wheat—it might be wheat. I remember further that when I didn't take very kindly to his suggestion he said, "No, Baxter, you know we are [209—141] in the war, we should all be patriotic. They have an oversupply of wheat in Australia, a lack of tonnage to move it, and we on this Coast are eating more bread." Mr. Comyn told me of this on the floor of the Exchange. I remember generally the letter of September 20, 1917, in which I wrote, "This cargo, as you know, was sold for October/December loading. The vessel's position to-day is 96 days out from Melbourne." That was after we sent the specifications, in which we first called attention to the fact that she would probably not get here. I don't remember whether my conversation with Mr. Comyn was before that date or afterwards, but it must have been close along there somewhere; it must have been right close along there, I should say within two or three weeks. I would not like to be nailed down to saying that it would be within eighteen days. I cannot place the limit to this conversation. It was before I learned that he had made arrangements for rechartering the "Marston," but it had been accomplished before he approached me. My best impression is that it was in September that I had this conversation. I think it was in September. I do not know that Mr. Comyn was in Washington from September 7th until October 10th. If you told me that this was the fact, it would not change my recollection

(Testimony of A. A. Baxter.)

a particle. When you tell me that this was the fact, I say, then, that it must have been prior to September 7th. If it develops that Mr. Comyn was in Washington from September 7th to October 10th or October 8th, then I would say that I would place this conversation back of his trip to Washington, back of September 7th. I won't swear that it was prior to September 7th that he talked to me about making this change in the charter. I think it was. In our letter of September 20, 1917, we make no reference to this change in the charter.

Mr. SUTRO.—Q. You simply said the vessel would have very little chance of discharging her cargo because she was 96 days out from Columbia River to Melbourne. Did you think that the change in the [210—142] charter would make a change in her time of arrival here?

A. I thought it would put her backward.

WITNESS.—(Continuing.) In our letter of September 20, 1917, we assigned as the only reason the fact that she had not yet reached Melbourne. I still think that it was prior to September 7th that Mr. Comyn talked to me. I think it must have been.

Thereupon Plaintiffs' Exhibit 25 was admitted in evidence, and was in words and figures as follows, to wit:

(Testimony of A. A. Baxter.)

Plaintiffs' Exhibit No. 25.

“San Francisco, Cal., October 17, 1917.

Messrs. Comyn, Mackall & Co.,

San Francisco, Cal.

Dear Sirs:

With reference to the lumber charter of the ‘W. H. Marston’ dated April 11th, 1916, which provides that the vessel, after discharging her present lumber cargo in Australia, shall proceed ‘in ballast’ to her next lumber loading port; I have to confirm the arrangement made today whereby in consideration of Five thousand dollars (\$5,000) U. S. Gold, you agree to allow the owners of the vessel to bring back cargo from Melbourne to the Columbia and/or Willamette Rivers, and furthermore that the cargo of lumber to be furnished under the next lumber charter shall come from a Columbia and/or Willamette River mill, etc.

J. J. MOORE & CO.

By JOHN B. BLAIR.”

WITNESS.—(Continuing.) On October 16, 1917, the day prior to the letter, so far as a shipping man goes, even if the “Marston” had returned in ballast, I would think that she did not have more than one chance out of perhaps twenty of making her loading date for December loading under the contract. She had very little chance. She had practically no chance. A month later I do not know that she had lost that chance. On September 20th she had not arrived in Melbourne, and on October 4th

(Testimony of A. A. Baxter.)

she had arrived there. Her position was then known.

Thereupon the charter of the "Marston" was admitted in evidence as Plaintiffs' Exhibit No. 26. [211—143]

WITNESS.—(Continuing.) It was the custom and practice with my concern that the charters of these ships should be furnished to us, or copies of them furnished. It is a custom that a copy of the charter party be furnished to us before the vessel commences loading. Now, we get them as early as we can. To the best of my knowledge and recollection we never received a copy of the "Marston" charter-party. I suppose that we could have had it if we demanded it, but it is the custom of the charterer to send us a copy of the charter-party. If he fails to do so it is customary to ask for it. Looking at the charter of the "Marston," I would say that the cancellation date found on the last line was 12 o'clock noon of the 1st day of March, 1918; so that the charter of the "Marston" for which we sold this lumber would have been fulfilled if she had come back in ballast from Melbourne without any change in the charter and had arrived at her loading port at Astoria on March 1, 1918; that is, the charter would have been fulfilled as to the charterer, not the contract with me. I do not think we ever had a copy of the charter. By looking at it we could have ascertained the fact that the charter would have been fulfilled if the "Marston" arrived at her loading port at Astoria by March 1, 1918. If we had looked at the charter, we would have known that the

(Testimony of A. A. Baxter.)

vessel under her charter-party was not due to be canceled for failure to make her date of return, as long as she arrived by March 1, 1918.

Thereupon the sub-charter of the "Marston" by Comyn, Mackall & Co. was admitted in evidence as Plaintiffs' Exhibit No. 27.

WITNESS.—(Continuing.) If, through no fault of the buyer, there is a breach of the vessel's charter-party, so that they cannot tender the vessel, there are two answers as to whether or not they are thereby relieved from taking the cargo. There may be two reasons for a vessel not arriving. For instance, a vessel might be lost, [212—144] hopelessly lost, or damaged beyond repair, and in that case the buyer would be allowed a reasonable time within which to secure another vessel, taking into account the then condition of the freight market. If, for instance, it was during war times, I would say a reasonable time would be four months after the expiration of the delivery date. If it were to-day, I would say a reasonable time would be sixty days. Now, there is another phase to your question—supposing a breach of charter, that the vessel had arrived and had refused to go on with the charter, or supposing the vessel were late, our custom then would be, if she had not starting loading within the time, at our option we cancel the cargo entirely. I have a regular printed form on that. In case of delay, damage or loss of the vessel chartered, the buyer is not relieved under our custom, or the custom of the trade, from taking the cargo. But there are three questions there in-

(Testimony of A. A. Baxter.)

volved. Splitting it up, and supposing that the vessel is delayed so that she cannot make her loading date, it is at the seller's option whether the buyer is obliged to take the cargo when the vessel arrives, just the same as the cancelling date of a vessel is at the charterer's option if she is beyond her cancelling date; when she does arrive, the charterer declares his option within 48 hours of the time, either to take the vessel or to reject it. If the vessel is delayed, having been named in the contract, under such a contract as is in evidence here, the buyer is not relieved from taking the cargo. If she is damaged or lost—they go together—so that she cannot reach the loading port, he is under an obligation to take what was then cut to his specifications, what was cut at the time of the known loss or the known damage, and he is allowed a reasonable time within which to get new tonnage to move it. But if the vessel is lost before anything has been cut to the specifications, the contract is automatically canceled at the option of either party. If the vessel is delayed the buyer is not relieved. If the vessel is delayed, and fails to arrive, the buyer is not relieved of taking [213—145] the cargo. If the vessel is delayed to such an extent as the "Marston" was here, so that the buyer does not tender her, I would not give him any cargo if he did not put the vessel where I wanted it. Under such circumstances, the buyer is certainly not relieved. It would be a breach of contract, that is all, if he does not take it. If the vessel did not arrive, we would not give him any cargo at

(Testimony of A. A. Baxter.)

all, if there was no vessel to take it. Although the buyer is not relieved, he would have to take the lumber at the seller's option. If the market went up, it is at the seller's option whether he would have to take it or not.

Q. You did not say that a moment ago. You said he would not be relieved from taking the lumber, didn't you?

A. If the vessel is delayed he is not relieved from the taking of lumber.

WITNESS.—(Continuing.) The idea is that beyond the date of the contract the buyer has to take it, but the seller does not have to deliver it.

Mr. SUTRO.—Q. If the market goes down the seller does not deliver it, and if it does he takes it—I mean the other way around, if the market goes down the seller delivers it, and if it goes up the seller does not?

A. The seller is under no obligation to deliver it to him except within the date of the agreed contract.

WITNESS.—(Continuing.) Ninety days are allowed for the seller to take it, which is a great leeway, and he is supposed to take it within that time. If he does not take it within that time, it is always at the seller's option as to whether or not he will deliver it at a later date or an earlier date. I think I stated before why I put on this contract, Exhibit No. 1, "Sold prior to October 11, 1916." The Douglas Fir commenced actual business on the 1st of November, 1916. The organization of the Douglas Fir has not been a very important [214—146]

(Testimony of A. A. Baxter.)

circumstance in my life. It is true that it is my business. I would know pretty definitely when the Douglas Fir commenced operations. The 1st day of November, 1916, is the day when it was actually launched for business. The reason why the Douglas Fir, having been launched for business on November 1, 1916, I put in that contract [215—146a] "Sold prior to October 11, 1916," was that I was working on the Douglas Fir Exploitation & Export Company three years before it was accomplished. It was incorporated in 1913, and it was known if the company could ever be accomplished that I was to be its general manager. Now, along about in October, about this time, about the 10th to the middle of October, it became reasonably probable that the company would be accomplished. That meant a higher price. Everybody was expecting that, and that was the real object of it. Mr. Comyn was anxious to be covered on four cargoes that he had sold. I told him at that time that I had no authority to sell for the new company, but I expected it would be accomplished, and I would sell him those four cargoes for the Charles Nelson Company, and if the new company were accomplished we would transfer them over to the new company. I sold them to him at \$10 base, then, as all the other export houses were telephoning in asking, "Is this combine going to go?" I would say, "Well, it looks like it," and they would say, "Well, we had better get under cover with what we have got sold," and I told them there was no necessity, because if the combine were accom-

(Testimony of A. A. Baxter.)

plished we would take care of all their sales, and all their commitments, before we would put our price up. Now, when we did accomplish it, we asked them to send in to us a record of all their sales, and all their commitments, and they sent in a total of 18,000,000 feet, or about 18 cargoes, and they all reported it had been sold at \$9.50 base. These four cargoes were of record at \$10. I immediately communicated with Mr. Comyn by 'phone, or personally, and said, "Now, Comyn, we will cancel the \$10 contract and give you a \$9.50 contract, which will put you on the same basis as the other people." That is the way, and that is why that was put on there. I do not remember whether Mr. Comyn had a contract with the Charles Nelson Company dated October 17th. I do not recall ever seeing this paper which you show me, before. My initials are not on it. [216—147] My signature is not on it. I do not remember ever seeing or hearing of this before. I do not remember ever seeing the original of this before. To the best of my knowledge, I have not. I was the manager of the Charles Nelson Company up to the last day of October.

Mr. SUTRO.—Q. Don't you know that Mr. Comyn had a contract for four cargoes with the Charles Nelson Company?

A. For four cargoes?

Q. Yes. A. That is the four cargoes.

Q. This is the contract, is it not?

(Testimony of A. A. Baxter.)

A. No. This is the contract for four cargoes here.

Q. Don't you know that Mr. Comyn had this contract with the Charles Nelson Company, this contract dated October 17, 1917?

A. It seems as though it is the same vessel, the "Marston."

WITNESS.—(Continuing.) It appears to be the same contract. It must have been the same contract that we took over in this memorandum of November 2d, but I cannot understand its being October 17th here, and October 11th there. I cannot explain that. Four cargoes were transferred to the Douglas Fir Exploitation & Export Company, and the prices changed. I presume that this contract of October 17th is the contract referred to in the instrument of November 2d, as having been sold prior to October 11th, and if there is any error, it is in the dates.

Mr. SUTRO.—Q. Have you any doubt that the sale referred to in your memorandum of November 2, 1916, is the sale shown on this letter of October 17, 1916?

A. I do not want to go by that. This is the same as that, where it is marked Sold prior to October 11th. I don't know about this. I have no signature on that, but I think it is the same thing. I think it is all one and the same thing, but I don't know about that; I never saw that before, to my knowledge. [217—148]

(Testimony of A. A. Baxter.)

WITNESS.—(Continuing.) Our letter of November 2, 1916, indicates that there was a sale to Comyn, Mackall prior to October 11, 1916. I recognize this memorandum dated October 17, 1916. It may be the same thing. I think that it names the “Mars-ton.” I cannot remember ever seeing that letter of October 17th before, but I do remember the other one, the one which I hold in my hand. I have several times said that the Douglas Fir was launched for business on November 1, 1916. When you read from the letter addressed to Comyn, Mackall & Co., dated July 17, 1917, as follows, “We actually launched this company”—meaning the Douglas Fir—“for business on October 11, 1916, and as you know we immediately notified the export merchants here that we were willing to take off their hands all the old business they had on hand,” you do not refresh my recollection as to how the date came in there. I think we had a meeting of the Company on October 11th. We did not launch the Company for business on October 11, 1916, but I was elected General Manager on that date, to take effect November 1st. That is my recollection. The signature on the letter that you show me is my own. That letter contains the statement, “We actually launched this company for business on October 11, 1916.” There may be something further on as to that. What I had in mind as to the launching of the business on the first of November was that at that time I took possession of my position, and actually started that business, but I was elected, I think, on

(Testimony of A. A. Baxter.)

October 11th. It did not take effect until November 1, because I was still manager of the Charles Nelson Company until the last day of October, and commenced with the new company on the first day of November. As to which is the more important stipulation in my opinion in these two contracts, the naming of the loading time or the naming of the vessel, I think they are equally important. I have made contracts in which the vessel was not named. In some cases our printed form of contract provides that the vessel need not [218—149] be named until thirty days before her arrival. Our printed form for a sailing vessel provides that such a vessel is to be named and her position given at least thirty days before lay-days begin, but the loading days are always fixed in the contract. I still say that the loading dates and the names of the vessels are equally as important as the price. The name of the vessel does not affect the price. The naming of the time does affect the price. We have quarterly bulletins in which our prices vary. Throughout 1916 and 1917, the later the delivery the higher the price. The price was the same whether the vessel was named or not, where it was for the same delivery. I still think that the name of the vessel and the naming of the time are equally important. The naming of the time actually governed the price. I said this morning that a contract for 1300 M feet 15% more or less to suit capacity, in which a vessel is named, is a contract for a full cargo of that vessel, regardless of how much she might take. The

(Testimony of A. A. Baxter.)

purpose of putting in 1,450,000 or 1,300,000, more or less, is merely an estimate between the buyer and the seller that neither objects to, as to what the capacity of the vessel is. 15% more than 1,300,000 feet in this case would be 1,450,000 feet. If the "Marston" had been tendered to me, and she had required 1,600,000 feet or 1,700,000 feet, I would have loaded that excess at the same price, if she had arrived within her loading date. She would have been loaded by me at the same price. In fact the estimated quantity put in there, 1300 M, means nothing more to us than it would have meant had we omitted it, and just said a full and complete cargo for the "Marston," which is the same. The testimony of the witness Griggs that, if the capacity of the vessel exceeds the 15% named in the contract, the seller is not obliged to deliver that excess, is not correct on a named vessel. I will tell you why we demanded of Comyn, Mackall & Co. that they should pay us for the excess that the "Bowden" and "Golden Shore" were going to carry in excess of 15%, \$20 base price, instead of \$9.50. They are two entirely different cases. In the case of the "Marston" I sold him the [219—150] cargo for the "W. H. Marston." It was estimated at 1,300,000 feet, 15% more or less, but had she taken 25 or 30 per cent more or less, I was under an obligation to furnish her a full cargo. In the other case I sold him 1,450,000 feet to be lifted by two of his vessels to be named, 15% more or less to suit their capacity. Now, it was evidently his intention, and my expecta-

(Testimony of A. A. Baxter.)

tion at the time the contract was made, to name two vessels within that range. When he named the first vessel, she took considerably over half of it—I forget her name now. When he named the second vessel, she would exceed the contract, and, had I accepted that vessel without protest as coming within that range, I then would have been under an obligation, probably, to furnish it, but immediately he named the second vessel, she, taken in conjunction with what the first vessel had loaded, exceeded the amount I sold him. But that was a case where it was not a named vessel at the time of the contract, but he agreed to name two vessels to me, the capacity of the two combined to be 1,450,000, 15% more or less, and for the excess he had no contract, and I gave it to him at the greater price. He did have such a contract for the excess on the “Marston” and on the “Talbot,” because they were named at the time of the sale. He really had two contracts, one for the “Marston” and “Talbot,” for anything they might carry, and the other for two vessels to be named later, being the exact quantity that he specified, 15% more or less. That is the way the contract works out. It gets that result. That is my interpretation absolutely of this contract for four cargoes.

Mr. SUTRO.—Q. Of this contract for four cargoes, is it? A. Absolutely, yes.

Q. You wrote him, “We enclose herewith the following orders: Order No. 39, Schooner ‘W. H. Talbot.’ We have placed this with the Raymond Lum-

(Testimony of A. A. Baxter.)

ber Co., of Raymond, Washington; vessel to be named, 725,000. We have placed this cargo with the Hanify Co. at Raymond, [220—151] Washington. Vessel to be named, 725,000; we have placed this with the Kleeb Lumber Co., South Bend, Washington. Schooner 'W. H. Marston'; we have placed this cargo with the Knappton Mills & Lumber Co., at Knappton, Washington," and the "Marston" and "Talbot" cargoes were given at 1,300,000 and 1,000,000 feet. Do I understand you to say that if instead of putting in here "Vessel to be named," you had put in the vessel's name, that then he would not have been entitled, or would have been entitled to the excess cargo at the same price, regardless of the fact that that quantity was named?

A. Had these two vessels that he put in there later been named at the time of the contract, even though their capacity had been understated, I would have been under an obligation to furnish him a full cargo for both vessels.

WITNESS.—(Continuing.) We used both forms of contract in our company. We have only one form, but both conditions; that is, where the vessel is named in the contract, and where the vessel is not named in the contract. Our printed form does not necessarily provide for a vessel to be named. It works out both ways. The vessel is named, or the vessel is to be named. It works in both cases. Our printed form says, "Vessel to be named and position given 30 days before lay days begin." That is one part. In another part, at the top, we name

(Testimony of A. A. Baxter.)

the vessel, where the vessel is actually named in the contract. We put the name of the vessel on this printed form in there on a blank line, underneath the word "vessel," the "W. H. Marston," 1,300,000, 15% more or less to suit capacity of the vessel. Our contract in paragraph "G" recites, "Vessel to be named and position given 30 days or more before lay days." That does not mean some other vessel may be substituted. It means that if there is no vessel named up at the top, this condition down below will govern. That is our printed form, if she [221—152] is not named already in the contract up above.

This lumber for the "Marston" was never cut. None of it was cut. Prior to December 31, 1917, I was in a position to tell if I had any reason to expect that the vessel would be in a position to receive delivery. I instructed the Knappton Mills that the specifications had been furnished me, but that I was not sending them forward because the vessel could not make her loading date, because I did not think that she could make her loading date. I said something to that effect; I do not remember exactly. It is three years back, but I remember the substance of it. The meaning of it is there. I withheld the specifications from them anyway. On October 8th I wrote them, "This vessel has practically no chance of discharging there and arriving at your mills during December. We have the specifications, but have not forwarded them." The lumber was never cut. If Mr. Comyn had put a dozen

(Testimony of A. A. Baxter.)

barges up there, we would not have delivered the lumber to him. The fact that he only put one barge there makes no difference, not a particle of difference to us. I told him before he put the barge there, "Do not incur the extra expense; I will give you anything you want to satisfy you that we will not deliver the lumber to the barges." I think that is confirmed in the letter I wrote him. I do not know of any cases where export lumber has been delivered to barges for export. As a means of transporting it from the mill to the exporting vessel, we sometimes do that. There is quite a bit of it goes in that way. We have a regular base schedule charge for barging, and we modify those prices right along, but we do not export it by barges. We used barges to deliver it from the mill to the exporting vessel. We have price circulars for barging alongside an export vessel. We have not price circulars for barging alongside another barge. We have price circulars for barging to an export vessel, and nowhere else. The circular which you show me denominated Price Circular No. 1, dated May [222—153] 24, 1917, is ours. It provides, "If not ordered at the time of purchase to be charged as above plus 50 cents per thousand for all lumber that has already been cut and delivered on mill wharf."

Mr. SUTRO.—Q. So there is nothing contrary to custom in delivering the lumber to barges, whether for export or otherwise, I do not care, but there is nothing contrary to custom in delivering lumber on to barges, is there?

(Testimony of A. A. Baxter.)

A. I say there is; we do not deliver it on a barge; we use the barge as a means of delivering it to the vessel. Our delivery is not complete when it is put on the barge. It is our lumber until it goes into the ship's slings.

WITNESS.—(Continuing.) We insure it when it comes aboard the barge. Our delivery is not complete until the lumber is in the ship's sling. If the barge turned turtle, so that we do not deliver it to a barge, if the wharf burned down on which the lumber was delivered, the loss would be ours, before it was in the ship's sling. We deliver it on the wharf, but that does not constitute delivery. We put it on the wharf. Our base price in October/December, 1917, for this lumber, for October/November/December loading—on August 30, 1917, we issued the price list which was in effect until January 24, 1918; that would be the price list. Our old price list for September to December, 1917, was \$20 base, "H" list—not "G" list. We did not have any price for "G" list. We changed to the "H" list, and it superseded the "G" list, and this \$20 was net cash. We dropped the old custom of $2\frac{1}{2}$ and $2\frac{1}{2}$. The letter which you show me dated August 8, 1917, is signed by me. In the fall of 1917 my relations with Mr. Comyn were such that for a period of time I refused to sell him lumber.

Mr. McCLANAHAN.—That answer is limited to new business, not the present contract.

Mr. SUTRO.—Yes. That is all. [223—154]

**Testimony of Robert Dollar, for Plaintiff
(In Rebuttal).**

ROBERT DOLLAR was called as a witness on behalf of the plaintiffs in rebuttal, and being first duly sworn, testified as follows:

I have been in the export lumber business for some time, approximately forty years. My companies are the Dollar Steamship Company. We have different companies. There are other Dollar Companies than the Dollar Steamship Line. We have our own line of steamers. I am familiar with export lumber contracts and the custom pertaining to them.

Mr. SUTRO.—Q. Suppose a contract is made for a million feet, 15% more or less, to suit capacity of vessel, the vessel being a sailing vessel, and the vessel is named in the contract, and the vessel fails to make her loading date, which we will assume is October to December, 1917, she fails to get there in time, what is the custom of the trade with reference to the obligation of the seller to deliver that lumber to the buyer if he demands it and agrees to take it within the time specified on some other craft?

A. To take it within the time specified?

Q. Yes, on some other craft.

A. The custom would be that he could put in another craft if his ship was delayed, or if for some reason he could not get the ship, it would be quite in order to put in another craft to take it if he took it in time.

(Testimony of Robert Dollar.)

Q. Under such circumstances, is there a custom which would govern the respective rights and obligations of the seller and buyer with reference to the delivery of that lumber?

A. If it could not be delivered on one craft, the custom has been that it could be delivered on another craft.

Q. Is there a custom which would entitle the buyer to tender its barges to take that lumber?

A. It would be immaterial, as long as it did not cost any more to deliver it to barges than it would cost to deliver it to the vessel [224—155] in question. That would be my judgment.

WITNESS.—(Continuing.) Where a contract provides for delivery f. a. s. mill wharf, or free alongside the mill wharf, I do not think that there is any custom that governs the right of the buyer to take the lumber otherwise than in a sailing vessel or on barges, if he took it within the time stipulated, and he was willing to take the lumber not any faster than what the mill had agreed to deliver. For instance, a sailing vessel generally takes about 70,000 feet a day, or probably 75,000, and a steamer would want a quarter of a million feet a day; so that it would not be the custom that the mill would be forced to deliver the lumber quicker than it was intended in the first place to the craft.

Mr. SUTRO.—Q. Would there be a custom on a f. a. s. mill wharf contract that would require or would not require the mill to deliver the lumber if the buyer was ready to take it?

(Testimony of Robert Dollar.)

A. Oh, no—there is a custom, yes. The mill would have to deliver it.

WITNESS.—(Continuing.) In cases where the vessel is named, I do not think that the custom is so material. The reason of naming a vessel, I would say, is to give a latitude, so that if the ship is late, and she was about to arrive, they would have to give it even after the time stipulated. Prior to October, 1916, there was a custom of the trade according to which, if a sailing vessel was named and did not make her loading date, she would be loaded if she made the date after the time fixed. That is always the custom for a reasonable time; not for all time to come, because the vessel might be lost and never would come. If the contract is made for 1,300,000 feet, 15% more or less to suit capacity of a named vessel, and the vessel is not tendered, I should think that under the custom the quantity that would be delivered would be as near the exact amount as was stipulated for in the contract as possible. The reason for [225—156] elasticity to the contract is that sometimes a ship will take more and sometimes less than the ordinary cargo, and, hence, there is a stipulation in there of 10, 12, 14 or 15% more or less. If the ship is not produced, and the buyer demands the delivery on barges, the mill, according to the custom, would deliver him the exact amount, unless there was some left on the wharf there, and the mill would have a right to compel them to take that if the barge could carry it, to

(Testimony of Robert Dollar.)

clear the wharf and not leave tag ends of lumber cut specially for a certain market.

Mr. SUTRO.—Q. Would the same custom prevail, or would it not prevail, where the lumber was cut, and where it was not cut, if the buyer demanded delivery within the time specified.

A. The custom is, the mill does not start cutting lumber for a sailing vessel until she is here off the coast, or nearby, somewhere. With a steamer it is different. With a steamer you have got to have at least half the cargo on the dock when she arrives, but a sailing vessel, ordinarily, the custom is to cut the lumber about as quick as she will take it.

WITNESS.—(Continuing.) If a sailing vessel is not produced and is delayed, and the buyer furnishes the specifications and offers to take the lumber in some other manner than on a sailing vessel, I should say that the custom is that if I had a contract of that kind, and I have had some of them myself, I would never think of refusing to give the lumber to be delivered to some other vehicle or craft.

Cross-examination.

I do not think that that would be a matter of grace on my part. I know the Douglas Fir Company. I know that they are sellers of lumber for export. I knew nothing about this case until I came here. Mr. Baxter represents the Douglas Fir Company. I am not a member of the Douglas Fir. I am a manufacturer in [226—157] British Columbia and in Oregon. I have been manufacturing in Oregon. I am on both sides of the fence.

(Testimony of Robert Dollar.)

I am not a manufacturer in Oregon now, although I have been in the past. I beg your pardon, though, we have been manufacturing in Portland, I forgot that. It is customary for the parties to approximate the carrying capacity of the cargo and put it in the contract within 15% more or less. I am familiar with that class of contract. When such a contract is entered into, naming the vessel, and putting down the approximate carrying capacity, and following it by the limitation 15% more or less to suit the capacity of the vessel, where the delivery date is fixed at October to December, meaning that delivery is to take place at any time within the limitation, there is a custom that extends that delivery date to a reasonable extent. If the ship has been delayed for some reason, and would be in soon, it is not customary to say you must have the ship there, a sailing ship, on the day. Steamers are different. It is customary to extend that a reasonable length of time. By custom, I mean that it is being done. I have done it. I know others who have done it. I do not mean by the use of the expression "custom" that the seller of the lumber would have to extend the contract, but it is customary amongst us to do it. You might say that it is customary to grant that as a matter of grace. If we stuck to our legal rights, we would have to deliver the lumber within the delivery date. If the named vessel does not appear, there is a custom by which the buyer can put in another vessel within the delivery time. By custom in this respect I mean that we have been in the habit of doing it.

(Testimony of Robert Dollar.)

Mr. McCLANAHAN.—Q. Doing it, but you do not mean to say that the contract could be changed in that respect, when the contract names a particular vessel and the cargo is one to suit that particular vessel?

A. I don't know just what to say about custom. I am talking [227—158] about what we generally do amongst ourselves. I being a manufacturer of lumber, and a ship owner, it is customary to do it. I could not say that that is an absolute custom, because you might ask me what is the custom. We do it amongst ourselves. I would do it. For instance, if I sold a cargo of lumber to be delivered on a certain sailing vessel, and the owner of the sailing vessel, or the man that bought the cargo, said, Now, that ship has come to grief, or says, I don't know where she is, I am going to put in another vessel of like capacity; I certainly would give him the lumber, more especially if it was within the stipulated time. But if it was beyond the stipulated time, out of courtesy I should not stick for a few days, but I would have the right, I think the legal right, to say, No, the ship was to be here in December, and this is the 1st of January, and he would not be entitled to it. That is my judgment.

WITNESS.—(Continuing.) Offhand, I could not name one case where vessels have been allowed to be substituted for a named vessel in a contract, and where it was a sale of a cargo to suit the capacity of that named vessel, but I know I have done it myself. I think that it is customary. I do not think there

(Testimony of Robert Dollar.)

would be any question raised about it. Different vessels carry different cargoes. Of course, if I contracted to furnish a cargo of 1,300,000 feet to a ship, and the price went up, and the man said, "I am going to substitute a 2,000,000 ship for that," I would say, "Well, I will give you 1,300,000 feet at this price, but you must give me the difference for a 2,000,000 ship." The sale under a contract containing this expression, 1300 M feet, 15% more or less to suit the capacity of the named vessel, the amount of that sale, cannot be determined until after the vessel is loaded and her capacity found out.

Mr. McCLANAHAN.—Q. Now, when you substitute for that particular vessel another vessel, don't you run the chance that the substituted [228—159] vessel will carry more or less, perhaps, than the named vessel?

A. If they put in a ship to me to carry 2,000,000 feet, and I had agreed only to furnish 1,300,000 feet, I would give them 1,300,000 feet and no more, unless they gave me the increased price. It would be optional for me to give her any more.

Q. But the sale would be of a parcel of lumber to suit the capacity, the loading capacity of a particular ship, and if you substituted another ship similar in appearance, similar in tonnage, you would still not be delivering on the substituted ship the cargo that would suit the capacity of the named ship, would you?

A. You might or might not. It would altogether depend on whether the price of lumber had gone up

(Testimony of Robert Dollar.)

or gone down. If the price of lumber had gone down, everything would be lovely, so far as the mill would be concerned, and if the price of lumber had gone up, then it would not be.

WITNESS.—(Continuing.) I know nothing of this case, as to whether the price of lumber had gone up.

**Testimony of W. Leslie Comyn, for Plaintiffs
(Recalled).**

W. LESLIE COMYN, recalled as a witness on behalf of plaintiffs, having previously been duly sworn, testified as follows:

Between September 7th and October 8th, 1917, I was in Washington and New York. I was not in San Francisco during any part of that time.

Testimony of James Tyson, for Defendant.

JAMES TYSON, was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

I reside in Piedmont, and my occupation is lumber and shipping. I am president of the Charles Nelson Company. The Charles Nelson Company has been incorporated about twenty years. Captain Nelson was engaged in the business about forty years before that. Sixty [229—160] years in all in the lumber and shipping business, as an individual and a corporation. I have been president of the corporation eleven years. I am supposed to be intimate with the lumber and shipping business of the concern. We

(Testimony of James Tyson.)

have two mills located on Puget Sound. The average annual output of those mills I would say, roughly, is about 150,000,000 feet. I am supposed to be familiar with contracts for the sale of lumber to named carrying vessels. The meaning of the term "f. a. s." is free alongside the ship, within reach of ship's tackles. There is a custom of the trade where a cargo of export lumber is sold to be carried by a named vessel, which is to load within a specified time, that requires that named vessel to be there within the loading period specified to make the contract good. That custom prevailed in 1916 as well as at the present time. It was general and well recognized at that time. There was no custom of the trade at that time under which the buyer could present the named vessel either before the designated loading period or after the expiration of that period. The contract covered the period. There was no custom at that time by which a buyer could substitute barges for the named loading vessel without the consent of the seller, within the loading period. The buyer could not substitute another vessel for the named vessel within the loading period without the consent of the seller. I have had experience with contracts for the loading of named vessels, where the vessel failed to make the loading date; that is to say, our company has.

Mr. DERBY.—Q. Has your company ever cancelled any contracts because the vessel failed to make the loading date specified in the contract?

Mr. SUTRO.—He can testify to the custom, your

(Testimony of James Tyson.)

Honor, but I don't think on cross-examination he can testify to what he did.

The COURT.—No, he cannot testify to what his particular company may or may not have done; it may have gotten into a controversy with [230—161] some buyer, the same as your company has.

Mr. DERBY.—Does your Honor sustain the objection?

The COURT.—Yes, I don't think that is proper.

To which ruling the said defendant duly excepted and now assigns the same as error.

EXCEPTION No. 10.

Cross-examination.

I am one of the trustees of the Douglas Fir. I represent the Charles Nelson Company on the board. I have not been actively instrumental, perhaps, in developing the policy of the Douglas Fir; I guess I have been, passively. I do not attend many meetings of the Board of Trustees of the Douglas Fir, because the meetings are held in Seattle and Portland, and I do not go north to attend meetings. When the meetings are held here, I sometimes go to them, and I sometimes do not. I have a voice in the policy. I do not admit that my concern is one of the large and important members of the Douglas Fir. We are simply one of a good many. There are probably none who are larger or more important members than Pope & Talbot. We are probably next to Pope & Talbot. I cannot admit that we are very important. With regard to whether or not prior to the operation of the Douglas Fir there were many cases

(Testimony of James Tyson.)

where a vessel could not make her loading date in time, and where the seller extended the time for loading, I would say that it was often done by mutual consent. It was very usual for the seller to extend the loading date. I will explain that if you will permit me. On a rising market, it was not done; on a level market, where the prices did not change, it was often done. But on a rising market, where the lumber was worth more for later loading, it was not very often done. It was done by mutual consent, and as an accommodation to the buyer. Where there was a sale of a specified quantity of lumber, 15% more or less to suit [231—162] the capacity of the vessel, if the vessel took more than the specified quantity plus the 15%, the seller was not obliged to deliver that excess up to capacity of the vessel. If a vessel has a capacity of 2,000,000 feet, and there is a contract for 1,300,000 feet, 15% more or less, the buyer could not claim the entire 2,000,000 feet to suit the capacity of the vessel, from us. As a matter of custom, he would be entitled under such a contract to the maximum of his contract. That would be 1350 M plus 15 per cent. If he wanted more than that to fill the vessel, and if the market had gone up, he would have to make a special deal for that excess. It is optional with the seller to give it to him or not, as he saw fit. The sale of a quantity of lumber, 15% more or less to suit capacity of the vessel, is, so far as the maximum is concerned, a sale of that quantity plus 15%. That is the way I would construe it.

(Testimony of James Tyson.)

Mr. SUTRO.—Q. And it is not the sale of a full cargo to that vessel?

A. They are supposed to name the quantity that will cover the load or the cargo of the vessel. An illustration, if the vessel carries one and a half million only, ordinarily you cannot always gauge the capacity of a vessel exactly, because in the summer time they will carry more and in the winter time they will carry less, they generally name the average capacity of the vessel, and then they have the 15% to go on, up or down.

WITNESS.—(Continuing.) The controlling factor in the quantity that the mill must deliver under such a contract is the quantity stated plus 15% more or less, and not the capacity of the vessel. So far as I remember, I have not known of instances where lumber sold under a contract, which either named a vessel or provided that a vessel was to be named, was delivered to barges where the vessel could not make the loading date. I could not say that such instances did not occur with our firm, without going over the records. If it were [232—163] done, it was by special arrangement and as an accommodation to the buyer.

Mr. SUTRO.—Q. What I am driving at is, you will not say, will you, that your firm has not delivered lumber, export lumber, sold under a contract where a vessel was named and did not make her loading date, to barges, whether by special arrangement or otherwise?

(Testimony of James Tyson.)

A. To be stored at another place for later shipment?

Q. To deliver on to barges, the buyer to take it as he saw fit.

A. We have delivered to barges very often for transshipment at Seattle, where the steamers would not come to the wharf, or where it was cheaper for the buyer to barge the lumber to a steamer in Seattle or Tacoma than to bring the steamer to our wharf.

WITNESS.—(Continuing.) I do not think that I have known of cases where by special arrangement export lumber was delivered to barges without any restriction, where the sailing vessel could not make the loading date, not unless the vessel was named or unless bills of lading afterwards would be produced to prove that the lumber went export. I have no recollection of it. I know a Mr. Thornton. He is in our office. He is in charge of the sales records in the office. I now the schooner "W. H. Smith." I guess that we had a contract with Dant & Russell to load the "W. H. Smith," and she was quite late in making her loading date. Dant & Russell loaded her after she was late. The market had not gone up any. I do not think that the market had gone up to the extent of \$30,000 on that cargo. I could not tell you without the data how much it had gone up. They did load her away beyond the cancelled date for us. That was last year; no, it was the present year; it must have been early this year, I think it was about March or April. I do not remember the market for lumber in March or

(Testimony of James Tyson.)

April of this year. As to whether it was higher or lower than in the fall of last year, I really don't know. They have been raising and lowering the prices. It is [233—164] not a fact that until very recently we have been on a rising market. I think the price dropped about \$5 about six months ago. I do not know when we bought that cargo for the "W. H. Smith." It was some time last year. I think we bought it for November/December loading. She had heavy repairs to make here, and the strike intervened, and she was about six months here repairing. I cannot tell you how much the market had gone up. If I were at my office I could tell you. I know that as a matter of fact Dant & Russell loaded the "W. H. Smith" several months late. I do not know whether the market went up. I could not say that. Mr. Baxter can tell you what the prices were during the period for which the cargo was engaged, and also the period during which it was loaded. I am not familiar with the prices. I can furnish you all this information. I cannot do it to-day though. I am going back to my office from here. I will telephone it out. I will look it up and see what loading she was booked for, and also what loading she made. The fact that if Dant & Russell had taken the market price for that shipment, we would have had to pay \$30,000 more than our contract called for—that could not be, because the very most would be a difference of \$5,000 per thousand, and she carried, as I recall it, about one and a quarter million, so that would be only \$7,500—

(Testimony of James Tyson.)

no, a million and a quarter would be \$6,000. I do not think that she carried a lot of clear lumber. I think it was all common lumber. I will look it up and telephone it to you.

Redirect Examination.

With regard to my testimony that the seller is not obliged to supply more than the excess of 15% over the contract price, that is simply my construction of the contract. I could only give my own construction, I could not give the other fellow's. The seller is not bound to load beyond the carrying capacity of the vessel. That is all she could carry. He could not move any more than the ship [234—165] could carry. The carrying capacity of the vessel varies with different seasons of the year. You cannot estimate just what it will be. That is the reason why they put in the 15% more or less. In the case of the "W. H. Smith," delivery was not made to barges, but to the ship. She was loaded late, because she was delayed here by reason of the shipyards strike. She was three or four months behind her time. We made the arrangements with Dant & Russell to load her whenever she was ready to load. We had to make a special arrangement with them, because she was beyond her time, but they were willing to grant that concession. The Charles Nelson Company has refused to load vessels which fail to make the loading period specified in the contract. We do that upon a rising market. On a level or a falling market we do not.

(Testimony of James Tyson.)

Recross-examination.

The time of delivery in the Douglas Fir contracts, or in the contracts such as we are accustomed to make, is supposed to govern the price, because the price is made for that particular loading and for that particular period. The prices often shift. Contracts are frequently made for a specified quantity, 15% more or less, vessel to be named. In such a contract, the thing that governs the price is the price stipulated in the contract. The price is always stipulated. That has nothing to do with the first quarter, or the second quarter, or the third quarter. Where she is not named in the contract, the name of the ship is an incident to the contract; but where she is named in the contract, it is a part of it. It is not an incidental part; it is a positive one. Very frequently contracts are made, vessels to be named.

Testimony of Claude L. Daly, for Defendant.

CLAUDE L. DALY was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

I reside at 2318 Grove Street, Berkeley. I am employed by [235—166] J. J. Moore & Company. In 1916 and 1917 I was employed by Comyn, Mackall & Co. in the Australian Lumber Department. I never told Mr. W. Leslie Comyn, the plaintiff in this case, that Mr. J. B. Blair, of J. J. Moore & Co., had offered the Douglas Fir Exploitation & Export Company, or Mr. Baxter, the manager of that company, \$2,500 or any other sum, if the Douglas Fir

(Testimony of Claude L. Daly.)

Exploitation & Export Company would extend the loading period of the "W. H. Marston." As manager of the Australian Lumber Department of Comyn, Mackall & Co., I myself made that offer to Mr. Baxter on behalf of Comyn, Mackall & Co.

Mr. DERBY.—Q. Mr. Daly, I notice your name is signed to some of these letters as J. Claude Daly; you have testified that your name is C. L. Daly.

A. My name is C. L. Daly.

Q. How does it happen that some of these letters are signed J. Claude Daly?

A. That is the peculiar way I sign by name.

Cross-examination.

The offer that I made was made in conversation with Mr. Baxter in his office. Mr. Comyn was not in the East at that time; he was in San Francisco. I left Comyn, Mackall & Co. on March 1st of this year, on the day following Mr. Comyn's return from Europe. I was in charge of his export lumber department for Australia for four years. As nearly as I can say, I was managing Mr. Comyn's export department for four years. I left on the day after he got back from Europe, and went to J. J. Moore & Co. They are competitors of Mr. Comyn's. With regard to how long Mr. Comyn was in Europe, I believe he left San Francisco in October, 1919, and I left in March. He was away five or six months. During those six months I did not assist J. J. Moore & Co. in the transaction of their business. I have had no differences with Mr. Comyn of my own seeking. I have not overdrawn my account there \$11,000.

(Testimony of Claude L. Daly.)

There is a controversy on about that now. I claim that I overdrew \$2,700, and Mr. [236—167] Comyn is incorrect. He may claim that I overdrew \$11,000, and that is the controversy now. I had some conversations with Mr. Baxter in 1917 with regard to his selling lumber to Comyn, Mackall & Co. It is quite a time back to recollect. I recollect this "Marston" controversy.

**Testimony of A. A. Baxter, for Defendant
(Recalled).**

A. A. BAXTER, being recalled as a witness on behalf of the defendant, having previously been duly sworn, testified as follows:

Since the examination yesterday I have refreshed my memory as to when, or approximately when, this offer of \$2,500 or \$3,000 was made to me by Mr. Daly. I now forget the date, but there was a letter which I wrote to the Knappton Mill Company. My recollection is that it is dated August 25th. The letter which you show me refreshes my memory and shows I wrote them on August 25, 1917. On that date I had knowledge from a representative of the plaintiff on the subject of whether the "Marston" was coming back in cargo. That knowledge came from Mr. Daly. He told me they had accepted \$5,000 to permit her to return in cargo, and offered to give me \$2,500 of it. I do not know positively that he said that settled the matter of her bringing the cargo back, but prior to this date he offered to give me \$2,500 out of the \$5,000 he was to receive. That is

(Testimony of A. A. Baxter.)

as far as I can say. It was after December 31, 1917, if at all, that I cancelled the contract for the "Marston" with the mill.

Mr. McCLANAHAN.—Now, if the Court please, in order to save the record, I offer to prove that the defendant commenced doing business on November 1, 1916, in anticipation of the passage by the Congress of the United States of what was and is now known as the Webb-Pomerene Bill, being the Act of April 10, 1918, permitting the organization of corporations or associations for the sole purpose of engaging in export trade, and being an amendment of what is popularly known as the Sherman Act. I offer to prove that the [237—168] anticipated early passage of the said Webb-Pomerene Bill was postponed, and said bill did not finally become law until April 10, 1918. That between the date of November 1, 1916, and the passage of the said Webb-Pomerene Bill, the defendant did business as an exporter only of Douglas fir, with the tacit consent of the Federal Trade Commission, a commission created by the Act of Congress on September 26, 1914, which commission, on the passage of said Webb-Pomerene Bill, was given, by that law, jurisdiction and supervision over the business and the affairs of corporations or associations organized to do an export lumber business.

Mr. SUTRO.—Pardon me a moment, Mr. McClanahan: This matter was pleaded and was stricken out by the Court.

The COURT.—But he is offering it now merely to make a record.

(Testimony of A. A. Baxter.)

Mr. SUTRO.—I will stipulate that you have made an offer to prove all the matters embraced in your special defenses, if you want to.

Mr. McCLANAHAN.—All right, that will be very satisfactory.

The COURT.—And the offer is overruled, or denied, and you have your exception.

To which ruling the said defendant duly excepted and now assigns the same as error.

EXCEPTION No. 11.

Mr. McCLANAHAN.—I offer to prove that plaintiffs' contract with their Australian buyers of the specification cargo to be furnished under the specification cargo contract in suit, was carried out at a profit to the plaintiff, and that such profit was the profit which the contract originally carried, although such contract with the Australian buyers was fulfilled by the "W. H. Marston" with the cargo loaded under the Dant & Russell contract.

The COURT.—The objection to that will be sustained, and you may have an exception. [238—169]

To which ruling the said defendant duly excepted and now assigns the same as error.

EXCEPTION No. 12.

Cross-examination.

Mr. SUTRO.—Q. Mr. Baxter, you testified this morning that prior to August 25, 1917, you were told by Claude Daly, that man who was on the stand here just now—that he had received \$5,000 for permitting the "Marston" to come back in cargo instead of in ballast: Is that your testimony?

(Testimony of A. A. Baxter.)

A. Yes. I don't know that I testified that he had received it, but that he had offered me \$2,500 out of \$5,000 that they could expect, or were offered, or had received—I don't know whether they had received it, I won't say they had received it.

Q. Well, you did say that.

A. Well, if I did say they had received it, I wish to change that and say that either he had or was going to receive it.

WITNESS.—(Continuing.) He positively offered me \$2,500. On August 25, 1917, I am not perfectly clear that Mr. Daly's firm had positively agreed to bring the "Marston" back in cargo, in consideration of \$5,000, but they had that offer, or they had accepted the offer, I am not sure which he told me. It might be either way, but he positively offered me \$2,500 if I would extend the loading date. On August 25, 1917, or prior to that date, I understood from Mr. Daly that he could get \$5,000 or some sum in excess of \$2,500 if he would permit the "Marston" to come back in cargo, and that he offered me at that time \$2,500 of that sum which he said he could receive or which he had received. The state of affairs, as I understood it on August 25, 1917, was that Mr. Daly's firm could get a consideration for permitting her to come back in cargo. Of that consideration he offered me \$2,500 firm. Prior to August 25, [239—170] 1917, Mr. Daly did not offer me \$5,000. I am sure of that. No one else on behalf of Comyn, Mackall & Company offered me \$5,000, but they intimated that possibly an amount larger than \$2,500

(Testimony of A. A. Baxter.)

would be paid. Prior to August 25, 1917, I do not think they intimated that \$5,000 might be paid to my company if it would agree to permit the "Marston" to take on a cargo, but they intimated that an amount larger than \$2,500 might be paid. I do not know how high the amount offered might have reached. I do not think any amount was intimated at all, but it was just that more might be given. The purpose of Mr. Daly's offer was to obtain our consent to extending the time to load the "Marston" and to take her when she arrived.

Mr. SUTRO.—Q. Let me put it to him this way: You will not state, will you, that on August 25, 1917, or prior thereto, Mr. Daly's firm had actually received or agreed to take compensation for bringing the "Marston" back in cargo? A. No.

Q. I want to show you this contract, Form B, that you testified to yesterday. In the line "Quantity," did you tell me yesterday that that line contemplates that the name of the vessel should be inserted there?

A. It works both ways.

WITNESS.—(Continuing.) It contemplates that it may either be named there, or that it may be left blank, the vessel to be named later. That is not a blank for figures. My answer is no, and yet, still, there is a part of it that might be yes.

Mr. SUTRO.—Q. I am asking you whether your printed form of contract, whether you do not contemplate that over the word "Quantity," in about line 3 of the contract, it is not intended in that form that figures should be inserted there, and not the name of the vessel?

(Testimony of A. A. Baxter.)

A. If the vessel is known at the time the contract is made, the [240—171] vessel would be named, “W. H. Talbot,” 1,000,000 feet, 15% more or less. That would be one case. Now, in another case, the vessel is not named in the contract, then you would insert just 1,000,000 feet, 15% more or less, the vessel to be named later.

WITNESS.—(Continuing.) The blank space there, with or without the name of the vessel, is intended for figures.

Thereupon Plaintiffs’ Exhibit No. 28 was admitted in evidence, and was in words and figures as follows:

Plaintiffs’ Exhibit No. 28.

**“DOUGLAS FIR EXPLOITATION &
EXPORT CO.**

San Francisco, Cal., ———, 191—.

Contract Form ‘B’

Sailer Cargo

- A. Confirming sale to you of the usual assortment of Sawn Douglas Fir Lumber of sizes, lengths and grades, as per usual ——— specification.
- B. QUANTITY: ———15% more or less to suit capacity of vessel.
- C. LOADING DISTRICTS: Puget Sound or Grays Harbor or Willapa Harbor or Columbia and/or Willamette Rivers. At not more than one accessible loading place in any one district where vessel can safely lie always afloat. Cargo to be delivered free alongside on wharf and/or at mills option or barge within reach of ship’s tackles.

D. MONTHS OF LOADING: —

E. LOADING DISPATCH: 60 M Feet Board Measure per working day.

F. DEMURRAGE: If any at — per net registered ton per day to be paid by the loading mill or mills or dispatch if earned equal to $\frac{1}{3}$ of the amount provided as demurrage to be paid by the vessel to the loading mill or mills for each day or fraction of day gained in loading.

G. VESSELS: To be named and position given 30 days or more before lay-days begin unless otherwise mutually agreed.

H. SPECIFICATIONS: To be furnished 30 days or more before lay-days begin.

I. MARKING: The Clear and Select will, at buyer's option, be marked by the seller free of charge. This to enable receivers of cargo to easily separate the [241—172] grades. Any further marking if ordered by the buyer to be done by the seller at following cost: Any distinguishing mark of not over 3 letters 10c per M; lengths on one end malleted in 15c; lengths and dimensions on one end malleted 25c.

J. PRICE: — —

Base — list NET CASH and all other conditions of sale as per — list, except marking charges as above provided for. Payment to be made in United States Gold Coin within five days after delivery of documents.

K. TALLY & INSPECTION: At loading port by Pacific Lumber Inspection Bureau, certificate to be furnished and to be final. Buyer's option to

also inspect in accordance with — List and any differences between the two to be settled by the Chief Supervisor of the Pacific Lumber Inspection Bureau or his Assistant.

- L. STEVEDORES: If any employed to be satisfactory to the loading mill.
- M. Buyers not to be responsible for any consequences arising through the delay, damage or loss of the vessel chartered and named to the seller to load under this contract, nor for the failure of the vessel or her owners to fulfill the charter-party, or for breach of charter-party on the part of vessel, its owners and/or agents, but the provisions of this paragraph shall not relieve buyers from the taking of this cargo or any part of it then out and ready on mill's dock, and/or on barges; provided, however, that a reasonable time be allowed the buyer to lift such lumber, taking into account the then condition of the freight market.
- N. In case vessel is known to be lost or damaged and abandoned before anything has been cut on this order by the mills, then the buyer may, at his option, to be declared within ten days of such notice, either cancel the order or declare another vessel not more than 60 days later loading than above provided for the original loading.
- O. In case of fire, flood, snow, or other conditions beyond control of the loading mill, or mills, they to have privilege of moving vessel to another mill at their expense, but time lost on above account and/or in moving not to count as lay-days.

P. This agreement contingent upon Acts of God, Civil Commotions, Floods, Frosts, Snow, Ice, Storm, Fire, Fog, Railway, Mill or Machinery Accidents or Impediments, Strikes, Lockouts, Labor Disputes, Riots or Disturbances, Holidays, inability to secure transportation, or other causes of delay beyond the control of either party to this agreement.

(Signed in triplicate)

DOUGLAS FIR EXPLOITATION &
EXPORT CO.

By _____,
Seller.

_____,
By _____,
Buyer." [242—172a]

Thereupon defendant rested its case in chief.

**Testimony of W. Leslie Comyn, for Plaintiffs
(Recalled in Rebuttal).**

W. LESLIE COMYN, being recalled as a witness on behalf of the plaintiffs, in rebuttal, and having been previously duly sworn, testified as follows:

The letter which you show me dated October 29, 1917, from the Charles Nelson Co., signed by F. G. Thornton, the gentleman Mr. Tyson spoke about, was received by our firm.

Thereupon Plaintiffs' Exhibit No. 29 was admitted in evidence, and was in words and figures as follows:

Plaintiffs' Exhibit No. 29.

"San Francisco, Cal., October 29th, 1917.

Comyn, Mackall & Co.,

310 California St.,

San Francisco, Cal.

Gentlemen:

We have yours of the 24th inst. calling our attention to your letter of Sept. 25th relative taking deliveries of cargoes for the 'Robert B. Hind,' 'Encore' and 'Jas. H. Bruce' by barge should any of these vessels not make their respective loading, i. e.:

Schr. 'R. B. Hind,' capacity abt. 650 M. Nov./Dec. '17/Jan. 18, loading.

Schr. 'Encore,' capacity abt. 700 M. Jan./Feb./Mch. '18, loading.

Schr. 'Jas. H. Bruce,' capacity abt. 650 M. Feb./Mch./Apl. '18, loading.

We beg to say that you have the privilege of putting in barges for [243—172b] these cargoes in the event of any or all of these vessels being late, but this does not give you the privilege of substituting the Schr. 'H. D. Bendixen' for the Schr. 'Encore,' and to which we cannot agree. It is up to you to take delivery by the Schr. 'Encore' and if not, then by barges.

Very truly yours,

THE CHARLES NELSON CO.

Per F. G. THORNTON."

(Testimony of W. Leslie Comyn.)

WITNESS.—(Continuing.) This is one of the instances I had in mind when I stated on my former examination that sometimes lumber was taken by barges where the sailing vessel could not be produced. The lumber specifications that were furnished in this case to the Douglas Fir, and which they did not cut, were those known as Australian specifications. Those specifications are suitable only for the Australian export trade. The “Marston” had been loaded before with lumber many times. The quantity that she would take was approximately well known. The variation in this case of the amount that she actually loaded under the Dant & Russell contract was approximately 14,000 feet in excess of the 1,300,000 feet.

Cross-examination.

The contracts under which this concession was made to allow barges to be used, and which is referred to in this letter just introduced, I imagine are in our possession. They would be in the office.

Thereupon Plaintiffs’ Exhibits Nos. 30, 31 and 32 were admitted in evidence, and were in words and figures, respectively, as follows, to wit:

Plaintiffs’ Exhibit No. 30.

“September 1st, 1917.

Messrs. The Chas. Nelson Co.,
230 California Street,
San Francisco, California.

Dear Sir:

We now beg to confirm conversation between your

Mr. Tyson and the writer, and the arrangements within made.

‘Geo. E. Billings’—It is understood that this vessel board, and there is on the dock for her [244—173] 150 M feet. You have wired the Mill to allow the vessel to clear up this lumber off the dock, and she then proceeds to the Dominion Mill Company at Port Blakely to complete loading. It is understood that we have no claim against you in regard to the balance of the cargo.

In consideration of your Mills being closed by strike, and your inability, owing thereto, to load the ‘Rosamond’ and ‘Espada,’ it is agreed that you permit us to divert both these vessels to other loading points, and in substitution thereof you have agreed to supply either a usual West Coast or Australian specification to the following ships at \$11.00 Base ‘G’ List, less $2\frac{1}{2}\%$ and $2\frac{1}{2}\%$, this being the contract price at which you were to load the ‘Rosamond’ and the ‘Espada.’

The names of the vessels are:

‘R. R. Hind’—capacity of about 650 M, and expected to make November, December, ’17, January, ’18, loading.

‘Encore’—capacity of about 700 M, expected to make January, February, March, ’18, loading.

‘James H. Bruce’—capacity about 650 M, expected to make February, March, April, ’18, loading.

In the event of your being prevented by strikes and/or lock-outs from loading any or all of the above three vessels we to have the privilege of substituting other vessels or barges to take delivery

of the quantity of about 2,000,000 feet at \$11.00 Base 'G' List, less $2\frac{1}{2}\%$ and $2\frac{1}{2}\%$ within 90 days after the starting up of your Mills and your logging camps, you to notify us when you commence operations.

Please confirm, and return us one copy.

Yours faithfully,

COMYN, MACKALL & CO.,

Per _____.

CLD/L."

Plaintiffs' Exhibit No. 31.

"September fifth, Nineteen-seventeen.

Messrs. Chas. Nelson Company,

230 California St.,

San Francisco.

Dear Sirs:—

We have to acknowledge receipt of your September 4th, T-1, in duplicate.

The same appears to us to be in order with the exception that in the event of either of the three vessels named, namely the 'R. R. Hind'—'Encore'—'Jas. H. Bruce,' not making their specified loadings, we shall have the right of taking delivery of the cargoes of each and all of them by barges, and it is on this understanding that we accept the arrangement.

You will readily understand the reasons for this. If your mill is operating at the loading dates named on the respective vessels, and any or all of them should not make the specified loading [245—174] dates, you would be at liberty to abrogate the con-

tract, which would work a hardship on us in view of our taking the 'Billings'—'Rosamond' and 'Espada' cargoes from you and completing same at current prices.

Faithfully yours,

COMYN, MACKALL & CO.,

Per _____.

CLD—W."

Plaintiffs' Exhibit No. 32.

THE CHARLES NELSON CO.

"Yards:

San Francisco—Oakland
Wilmington—Los Angeles
San Jose—Sacramento
Hanford—Monterey
Watts—Torrence
Salinas—Martinez
Concord—Suisun

Mills:

Mukilteo, Wash.
Humboldt Bay, Cal.
Port Angeles, Wash.
Merced Falls, Cal.

Cable Address: 'Tyson.'

In reply refer to
No. T-4.

Manufacturers of Fir, Spruce, Redwood, Sugar and
White Pine Lumber Box Shook.

Hind Building,

230 California Street.

San Francisco, Cal., September 7th, 1917.

(Received Sept. 8, 1917.)

Comyn, Mackall & Co.,
310 California St.,
City.

Gentlemen:—

(Quotations subject to change without notice.
All agreements on our part are contingent upon the
Acts of God, strikes, lockouts, fires, floods, accidents,
or inability to secure cars or tonnage, or other causes
beyond our control, arrest or restraint of Princes,
Rulers, and People, the rights of eminent domain,

(Testimony of W. Leslie Comyn.)

exercised by the State or Nation, commandeering of vessels or products. Taxes National or State levied on freight bills to be paid by the purchaser.)

Yours of the 5th inst. in duplicate, received. We note you wish the right to take delivery of the cargoes for the 'R. R. Hind,' 'Encore' and 'Jas. H. Bruce' by barges in the event of any or all of these vessels not making their respective loading dates, to which we agree. Herewith please find accepted copy of your letter.

Very truly yours,

THE CHARLES NELSON CO.

Per F. G. THORNTON.

FGT—HJ."

WITNESS. — (Continuing.) The Australian specifications are the same ones that were furnished to Dant & Russell. The specification was received from the buyer in Australia. The peculiarity of Australian [246—175] specifications is that they run largely to large sizes, six by twelve, and larger, together with a lot of lath, which is only usable in Australia, according to its size. The amount of lath that can be put into one cargo for export under the "G" list is limited under the "G" list, but we always supply a great deal more. They always call for about two million lath to the cargo.

Mr. McCLANAHAN.—Q. But this contract was made under the "G" list, was it not, with the Douglas Fir?

A. The Douglas Fir accepted the specifications.

(Testimony of W. Leslie Comyn.)

WITNESS.—(Continuing.) The contract was made under the terms and conditions of the “G” list, and they accepted the “G” list, which called for the lath which was in the specifications. The Australian buyer of these large pieces of lumber cuts them up in Australia in their own mills supposedly. I do not know whether they bring them in in as large bulk as they can, for the purpose of the trade there. I have not been in Australia for twenty years. I believe that is the fact, but I do not know it of my own knowledge.

**Testimony of Harry I. Zimmet, for Plaintiff
(In Rebuttal).**

HARRY I. ZIMMET, called as a witness on behalf of the plaintiffs in rebuttal, being duly sworn, testified as follows:

I am in the import and export business with A. F. Thane & Co. We are in the lumber business. We have been in the lumber business a little over eight years. We have done an export lumber business, and I am familiar with the customs of the trade.

Mr. SUTRO.—Q. What is the custom of the trade with respect to the obligation of the seller to deliver lumber on a contract specifying the quantity 15 per cent more or less to suit capacity of vessel, where the buyer cannot produce the vessel? Do you get the question?

A. Yes, I get the question. Well, I don't really know as to that, we have never had a case in our own

(Testimony of Harry I. Zimmet.)

experience on a quantity [247—176] 15% more or less where we have not put the vessel in.

WITNESS.—(Continuing.) Of my own knowledge I would say that I do not know of any custom in the trade in case a sailing vessel is late and cannot make her loading date, and the contract calls for a specific quantity, 15% more or less, to suit capacity of vessel, which requires the seller to deliver the lumber. I know of instances where a cargo has been delivered to barges.

Cross-examination.

In a contract for a cargo purchased from the Douglas Fir, with a definite delivery date, the Douglas Fir refused to deliver the cargo because of the non-arrival of the vessel. We have a claim against them. We have an arrangement with them that if we win this case, they are to pay us. The name of the boat is the "Georgiana," and the contract was one where there was a specific time named as the delivery date. It was a named vessel. They had in the contract a limitation of 15% more or less to suit capacity of the vessel. I think there was a definite amount named as the estimated carrying capacity of the vessel. We subsequently loaded that vessel somewhere else under a similar contract, where she loaded within the delivery date. I could not say offhand what she carried.

Thereupon plaintiffs rested their case in rebuttal.

That the foregoing is all the testimony given in the case.

(Testimony of Harry I. Zimmet.)

Mr. McCLANAHAN.—Now, I want to renew the motion for the nonsuit in the exact terms in which it was made before.

Thereafter the Court denied said motion of defendant for a nonsuit.

To which ruling the said defendant duly excepted and now assigns the same as error.

EXCEPTION No. 13. [248—177]

Mr. McCLANAHAN.—Defendant also moves that the Court find in favor of the defendant upon the grounds stated in the motion for a nonsuit and upon the further ground that there is no substantial evidence or any evidence to sustain a finding in favor of the plaintiffs, and that upon the whole case, and on all the evidence, the Court can find only in favor of the defendant. Defendant requests that this motion be considered in the same manner as a motion to direct a verdict in a jury case, and as raising the question of whether there is any substantial evidence or any evidence which would support a finding or judgment for plaintiffs.

Mr. DERBY.—If your Honor please, when the Court passes on that motion, if the motion is denied, will he be deemed to have excepted to the ruling of the Court?

The COURT.—Yes.

The Court subsequently denied defendant's said motion for a finding in favor of the defendant.

To which ruling the said defendant duly excepted and now assigns the same as error.

EXCEPTION No. 14.

That thereafter, and upon the 28th day of December, 1920, the Court made certain findings of fact in the above-entitled case. That the first of said findings of fact was as follows, to wit:

“1. That prior to October 17, 1916, the plaintiff had contracted to purchase from Charles Nelson & Co., Manufacturers of Lumber, and the Nelson Company to sell to it 3,500,000 feet, ten per cent more or less Oregon (fir), shipment or loading July to December, 1917. No receiving vessel was named in the contract but a memorandum thereof was enclosed in a letter of date October 17, from the plaintiff to Nelson Company, saying that ‘it is probable that we will load under this contract the W. H. Marston, October, November, December, and the W. H. Talbot for same loading; on the balance of the contract we may put in two of our own vessels estimated 1,450,000 capacity, October, November, December.’ Thereafter and on November 1, 1916, defendant corporation, composed of various manufacturers [249—178] of fir lumber in Oregon and Washington, including the Charles Nelson Company, commenced doing business and took over the sales of lumber of the member concerns for export, and its letter to plaintiff of date November 2, 1916, as set out in Article III of the complaint was confirmatory of and by reason of the previous contract between the Nelson Company and plaintiff.”

To which said finding by said Court defendant duly excepted and now assigns the same as error.

EXCEPTION No. 15.

That Finding No. 2 of said Findings of Fact by said Court was as follows, to wit:

“2. In the lumber trade the letters f. a. s., f. o. b. and a. s. t., as used in the contracts between the plaintiff and defendant as set out in the pleadings mean respectively ‘free alongside; within reach of ship’s tackles,’ ‘free on board’ and ‘at ship’s tackles,’ and were so understood by both parties at the time of the making of such contracts.”

To which said finding by said Court defendant duly excepted and now assigns the same as error.

EXCEPTION No. 16.

That Finding No. 8 of said Findings of Fact by said Court was as follows, to wit:

“8. That on October 23, 1917, plaintiff notified defendant that it would have barges alongside the mill wharf on November 25th, ready to take delivery, and on the date named in such notice plaintiff did have a barge at the dock ready to take delivery. Defendant refused to make such delivery and on January 2, 1918, notified plaintiff that as the ‘Mars-ton’ had not arrived and the time had expired by limitation it had cancelled the contract.”

To which said finding by said Court defendant duly excepted and now assigns the same as error.

EXCEPTION No. 17.

That Finding No. 9 of said Findings of Fact by said Court was as follows, to wit: [250—179]

“9. That during the month of December, 1917, the prevailing market price of lumber at the place

of delivery was \$22.50 per thousand net base 'G' list, being a difference on the quantity of lumber specified in the contract between the market price and the contract price of \$17,511.00."

To which said finding by said Court defendant duly excepted and now assigns the same as error.

EXCEPTION No. 18.

That upon said 28th day of December, 1920, the Court reached certain conclusions of law in the above-entitled case.

That the first of said conclusions of law was in words and figures as follows, to wit:

"First: That the failure of the plaintiff to have the 'Marston' alongside the mill wharf ready to take delivery of the lumber within the delivery dates did not relieve the defendant from making delivery as demanded by plaintiff."

To which said conclusion of law by said Court defendant duly excepted and now assigns the same as error.

EXCEPTION No. 19.

That the second of said conclusions of law was in words and figures as follow, to wit:

"Second: That plaintiff is entitled to judgment against defendant for the sum of \$17,815.00 with interest from December 7th, and its costs and disbursements."

To which said conclusion of law by said Court defendant duly excepted and now assigns the same as error.

EXCEPTION No. 20.

Thereafter, within the time required by law, de-

fendant petitioned the Court for a new trial, which said motion for a new trial, after the same has been submitted for decision upon briefs, was by the Court, upon the 16th day of April, 1921, denied.

To which ruling the said defendant duly excepted and now assigns the same as error.

EXCEPTION No. 21. [251—180]

That upon the 25th day of February, 1921, counsel for plaintiffs and for defendant entered into a stipulation extending the term of court for the purpose of the preparation, filing and signing by the Court of defendant's bill of exceptions, and upon said day the Court made an order based upon said stipulation so extending the said term of court. Said stipulation and said order were in words and figures as follows, to wit:

“(Title of Court and Cause.)

STIPULATION AND ORDER EXTENDING
TERM OF COURT.

IT IS HEREBY STIPULATED by and between the respective parties hereto that the time for the decision upon defendant's petition for a new trial in the above-entitled action, and also the time for the serving of defendant's proposed bill of exceptions and the signing by the Court of defendant's engrossed bill of exceptions, and the filing of said engrossed bill of exceptions, in the said action, together with all procedure incident or necessary thereto, shall be extended from the term of court within which the decision in the above-entitled action was rendered to the term of court following

said term of court first herein referred to, and to such a time within said term of court last referred to as shall be subsequent to the ruling of said court upon said petition for a new trial in said action and within a reasonable time after said ruling.

Dated February 24th, 1921.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiffs.

McCLANAHAN & DERBY,

CHICKERING & GREGORY,

Attorneys for Defendant.

Pursuant to the foregoing stipulation, IT IS HEREBY ORDERED that the time for the decision upon defendant's petition for a new trial in the above-entitled action, and also the time for the serving of defendant's proposed bill of exceptions and the signing by the Court of defendant's engrossed bill of exceptions, and the filing of said engrossed bill of exceptions, in said action, together with all procedure incident or necessary thereto, shall be extended as by the terms of said stipulation is provided.

Dated February 24th, 1921.

FRANK H. RUDKIN,

Judge of the Above-entitled Court." [252—181]

That upon the 3d day of May, 1921, counsel for plaintiffs and for defendant entered into a stipulation concerning certain of the exhibits which had been introduced by defendant at the trial of this case, which said stipulation was and is in words and figures as follows, to wit:

“(Title of Court and Cause.)

STIPULATION AND ORDER CONCERNING
ORIGINAL EXHIBITS.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that defendant's original exhibits, introduced in evidence at the trial of the above-entitled action and marked respectively Defendant's Exhibits 'B,' 'C,' 'D' and 'E,' may be omitted both from the Bill of Exceptions and the Transcript of Record on appeal in said cause, and may be filed in the United States Circuit Court of Appeals for the Ninth Circuit in the original form in which said exhibits were introduced, and be considered as original exhibits in the Transcript of Record on Appeal, and said exhibits need not be printed.

Dated May 3, 1921.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiffs.

McCLANAHAN & DERBY,

CHICKERING & GREGORY,

Attorneys for Defendant.

It is so ordered.

WM. C. VAN FLEET,

Judge.”

And now, within the time required by law, defendant presents and files with the Court its bill of exceptions to be used upon appeal from the judgment entered in the above-entitled cause.

Dated July 19, 1921.

McCLANAHAN & DERBY,
CHICKERING & GREGORY,

Attorneys for Defendant. [253—182]

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the foregoing bill of exceptions on appeal from the said judgment heretofore rendered in the above-entitled action is correct, and the same may be settled and allowed by the above-entitled court.

IT IS FURTHER HEREBY STIPULATED that the foregoing bill of exceptions may be settled and allowed without the Southern Division of the Northern District of California by the Judge who sat at the trial of the above-entitled action with the same force and effect as if settled within said Southern Division of the Northern District of California.

Dated this 19th day of July, 1921.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff.

CHICKERING & GREGORY,
McCLANAHAN & DERBY,

Attorneys for Defendant.

The foregoing bill of exceptions on appeal from the said judgment having been duly presented for settlement within the time required by law, and the stipulation by the parties found to be correct, the same is hereby approved, settled and allowed.

Dated this 22d day of July, 1921.

R. S. BEAN,
United States District Judge. [254]

Receipt of a copy of the within Engrossed Bill of Exceptions is hereby admitted this 19th day of July, 1921.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiffs.

[Endorsed]: Filed July 25, 1921. Walter B. Mal-
ing, Clerk. [255]

(Title of Court and Cause.)

Stipulation and Order Extending Term of Court.

IT IS HEREBY STIPULATED by and between the respective parties hereto that the time for the settlement of defendant's proposed bill of exceptions and of plaintiffs' proposed amendments thereto, and the signing by the Court of defendant's engrossed bill of exceptions and the filing of said engrossed bill of exceptions in the above-entitled action, together with all procedure incident or necessary thereto, shall be extended to any time within that term of said court which shall begin in the month of July, 1921.

Dated June 28th, 1921.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff.

CHICKERING & GREGORY,
McCLANAHAN & DERBY,
Attorneys for Defendant.

It is so ordered.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed Jun. 28, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [255½]

(Title of Court and Cause.)

Petition for Writ of Error and Supersedeas.

The above-named defendant, Douglas Fir Exploitation & Export Company, a corporation, feeling itself aggrieved by the order of this Court and the judgment entered against it in this cause in the sum of Seventeen Thousand Five Hundred Ninety-two and 72/100 (\$17,592.72) Dollars, with costs, on the 31st day of December, 1920, a petition for a new trial having been denied upon the 16th day of April, 1921, comes now by its attorneys and petitions this Court for an order allowing it to prosecute a writ of error in the United States Circuit Court of Appeals for the Ninth Circuit under and in accordance with the laws of the United States in that behalf made and provided, and that an order may be made fixing the amount of security which plaintiff shall give and furnish upon said writ of error conditioned as required by law in cases where a supersedeas and a stay of execution are desired.

Dated June 24, 1921.

CHICKERING & GREGORY,
McCLANAHAN & DERBY,

Attorneys for Defendant.

[Endorsed]: Filed June 24th, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [256]

(Title of Court and Cause.)

Assignment of Errors.

Now comes the defendant above named, and files the following assignment of errors upon which it will rely on the prosecution of its writ of error in the above-entitled cause:

I.

That the trial court erred in overruling defendant's demurrer to plaintiffs' complaint herein.

II.

That the trial court erred in sustaining plaintiffs' demurrer to the five separate defenses set up in Articles I, II, III, IV, and V of said answer, beginning on page 11 of said answer and ending on page 19 thereof.

III.

That the trial Court erred in sustaining plaintiff's demurrer to the separate defense set up in Article I of said answer, beginning on page 11 and ending on page 14 thereof.

IV.

That the trial Court erred in sustaining plaintiff's demurrer to the separate defense set up in Article II of said answer, beginning on page 14 and ending on page 16 thereof.

V.

That the trial Court erred in sustaining plaintiff's demurrer to the separate defense set up in Article III of said answer, beginning on page 16 and ending on page 17 thereof.

VI.

That the trial Court erred in sustaining plaintiff's demurrer to the separate defense set up in Article IV of said answer, beginning on page 17 and ending on page 19 thereof. [257]

VII.

That the trial Court erred in sustaining plaintiff's demurrer to the separate defense set up in Article V of said answer, on page 19 of said answer.

VIII.

That the trial Court erred in rendering and entering the judgment against defendant in this cause, for the reason that the evidence was and is insufficient to support said judgment or any judgment against defendant.

IX.

That the trial Court erred in rendering and entering the judgment against defendant in said cause, for the reason that the evidence was and is insufficient to support said judgment in the sum of \$17,592.72 (with costs), inasmuch as the maximum judgment warranted by the evidence in said cause was for a sum at least 15% less than that amount; the contract upon which suit was brought having had in it the term that defendant should deliver 1300 M feet, 15% more or less—and the judgment for \$17,592.72 having been based upon a failure to deliver 1300 M feet without said 15% reduction.

X.

That the trial Court erred in rendering and entering the judgment against defendant in this cause,

for the reason that the evidence was and is insufficient to support said judgment, inasmuch as there is no evidence that the failure of plaintiffs to have the schooner "Marston" alongside the mill wharf, ready to take delivery of the lumber within the delivery dates, did not relieve defendant from making delivery as demanded by plaintiffs.

XI.

That the trial Court erred in admitting in evidence the testimony of W. Leslie Comyn as to the meaning of the words, "sold prior to October 11, 1916," contained in "Plaintiffs' Exhibit 1," the ruling upon which question is the subject of [258] Exceptions Nos. 1 and 2 in defendant's bill of exceptions.

XII.

That the trial Court erred in admitting in evidence the testimony of the witness, C. E. Dant, as to whether or not said witness, in his experience prior to October, 1916, had known of any case where the seller of lumber refused to extend the time of delivery because the vessel could not make the loading date, which said ruling of said Court is the subject of Exception No. 3 of defendant's bill of exceptions.

XIII.

That the trial Court erred in excluding the answer of the witness Comyn to the following question: "Are the terms and conditions of 'G' List for the benefit of both buyer and seller?" which said ruling of said Court is the subject of Exception No. 4 of defendant's bill of exceptions.

XIV.

That the trial Court erred in excluding testimony

offered by defendant to establish that plaintiffs' contract with their Australian buyers of the specification cargo to be furnished under the specification contract in suit was carried out at a profit to plaintiffs, and that such profit was the profit which the contract originally carried, although such contract with the Australian buyers was fulfilled by the "W. H. Marston" with a cargo loaded under the Dant & Russell contract, which said ruling of said Court is the subject of Exceptions Nos. 5, 6, 7, and 8 of defendant's bill of exceptions.

XV.

That the trial Court erred in denying defendant's motion for a nonsuit, made at the close of plaintiffs' case in chief, [259] inasmuch as each and every of the fifteen grounds set forth as the reasons why said motion for nonsuit should be granted were, and each of them was, a sufficient reason for granting said motion, which said ruling of said Court is the subject of Exception No. 9 of defendant's bill of exceptions.

XVI.

That the trial Court erred in excluding the testimony of the witness James Tyson in answer to the question as to whether or not his company had ever canceled any contract because the vessel failed to make the loading date specified in the contract, which said ruling of said Court is the subject of Exception No. 10 of defendant's bill of exceptions.

XVII.

That the trial Court erred in excluding testimony offered by defendant, which said offer was made in the manner following, to wit:

“MR. McCLANAHAN.—Now, if the Court please, in order to save the record, I offer to prove that the defendant commenced doing business on November 1, 1916, in anticipation of the passage of the Congress of the United States of what was and is now known as the Webb-Pomerene Bill, being the Act of April 10, 1918, permitting the organization of corporations or associations for the sole purpose of engaging in export trade, and being an amendment of what is popularly known as the Sherman Act. I offer to prove that the anticipated early passage of the said Webb-Pomerene Bill was postponed, and said bill did not finally become law until April 10, 1918. That between the date of November 1, 1916, and the passage of the said Webb-Pomerene Bill, the defendant did business as an exporter only of Douglas Fir, with the tacit consent of the Federal Trade Commission, a commission created by the Act of Congress on September 26th, 1914, which commission, on the passage of said Webb-Pomerene Bill, was given, by that law, jurisdiction and supervision over the business and the affairs of corporations or associations organized to do an export lumber business.

MR. SUTRO.—Pardon me a moment, Mr. McClanahan: This matter was pleaded and was stricken out by the Court.

THE COURT.—But he is offering it now merely to make a record.

MR. SUTRO.—I will stipulate that you have made an offer to prove all the matters em-

braced in your special defenses, if you want to.
[260]

Mr. McCLANAHAN.—All right; that will be very satisfactory.”

Which said ruling of said Court is the subject of Exception No. 11 of defendant's bill of exceptions.

XVIII.

That the trial Court erred in excluding testimony offered by defendant, which said offer was as follows, to wit:

“I offer to prove that plaintiffs' contract with their Australian buyers of the specification cargo to be furnished under the specification cargo contract in suit, was carried out at a profit to the plaintiff, and that such profit was the profit which the contract originally carried, although such contract with the Australian buyers was fulfilled by the ‘W. H. Marston’ with the cargo loaded under the Dant & Russell contract.”

Which said ruling of said Court is the subject of Exception No. 12 of defendant's bill of exceptions.

XIX.

That the trial Court erred in denying defendant's motion for a nonsuit in said cause when, at the close of all the testimony taken in said cause, said motion was renewed in the exact terms in which it had originally been made, which said ruling of said Court is the subject of Exception No. 13 of defendant's bill of exceptions.

XX.

That the trial Court erred in denying defendant's

motion, at the close of said case, for a finding in favor of defendant, upon the grounds previously stated in the motion for nonsuit and upon the further ground that there was no substantial evidence, or any evidence to sustain a finding in favor of the plaintiffs, and that upon the whole case, and on all the evidence, the Court could only find in favor of the defendant; which said ruling of said Court is the subject of Exception No. 14 of defendant's bill of exceptions. [261]

XXI.

That the trial court erred in making a certain finding of fact, inasmuch as there is no evidence in the record to support said finding and the same has no bearing on the case. Said finding is as follows:

"1. That prior to October 17, 1916, the plaintiff had contracted to purchase from Charles Nelson & Co., Manufacturers of Lumber, and the Nelson Company to sell to it 3,500,000 feet, ten per cent more or less Oregon (fir), shipment or loading July to December, 1917. No receiving vessel was named in the contract but a memorandum thereof was enclosed in a letter of date October 17, from the plaintiff to Nelson Company, saying that 'it is probable that we will load under this contract the W. H. Marston, October, November, December, and the W. H. Talbot for same loading; on the balance of the contract we may put in two of our own vessels estimated 1,450,000 capacity, October, November, December.'" Thereafter and on November 1, 1916, defendant corporation, com-

posed of various manufacturers of fir lumber in Oregon and Washington, including the Charles Nelson Company, commenced doing business and took over the sales of lumber of the member concerns for export, and its letter to plaintiff of date November 2, 1916, as set out in Article III of the complaint was confirmatory of and by reason of the previous contract between the Nelson Company and plaintiff."

XXII.

That the trial court erred in making a certain finding of fact, inasmuch as there is no evidence in the record to support said finding. Said finding is as follows:

"2. In the lumber trade the letters f. a. s., f. o. b. and a. s. t., as used in the contracts between the plaintiff and defendant as set out in the pleadings mean respectively 'free alongside; within reach of ship's tackles,' 'free on board' and 'at ship's tackles,' and were so understood by both parties at the time of the making of such contracts."

XXIII.

That the trial court erred in making a certain finding of fact, inasmuch as there is no evidence in the record to support said finding. Said finding is as follows:

"8. That on October 23, 1917, plaintiff notified defendant that it would have barges alongside the mill wharf on November 25th, ready to take delivery, and on the date named in such notice plaintiff did have a barge at the

dock ready to take delivery. Defendant refused to make [262] such delivery and on January 2, 1918, notified plaintiff that as the 'Marston' had not arrived and the time had expired by limitation it had cancelled the contract."

XXIV.

That the trial court erred in making a certain finding of fact, inasmuch as there is no evidence in the record to support said finding. Said finding is as follows:

"9. That during the month of December, 1917, the prevailing market price of lumber at the place of delivery was \$22.50 per thousand net base G list, being a difference on the quantity of lumber specified in the contract between the market price and the contract price of \$17,511.00."

XXV.

That the trial court erred in denying defendant's petition for a new trial, for the reason that each and every of the grounds set forth in said petition were, and each of them was, sufficient reason for granting said petition.

XXVI.

That the trial court erred in concluding, as a matter of law, that under the contract in suit defendant was bound to deliver lumber to plaintiffs whether the schooner "Marston" was at the dock to take such delivery or not.

XXVII.

That the trial court erred in not holding and deciding, as a matter of law, that the sale in the above

case was the sale of a cargo of lumber to suit the capacity of the schooner "W. H. Marston," which could only be fulfilled by the presence of said schooner at the loading port within the specified loading period.

XXVIII.

That the trial court erred in not holding and deciding, as a matter of law and of fact, that the requirement of the contract calling for the lifting of the lumber by the schooner "W. H. Marston" was a requirement which was for the benefit of the seller, as well as the buyer, and which could not be waived by the buyer alone. [263]

XXIX.

That the court erred in not making, rendering and entering a judgment for the defendant.

WHEREFORE said defendant prays that the judgment of said trial court be reversed.

CHICKERING & GREGORY,

McCLANAHAN & DERBY,

Attorneys for Defendant.

[Endorsed]: Filed June 24th, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [264]

(Title of Court and Cause.)

**Order Allowing Writ of Error and Supersedeas and
Fixing Amount of Bond.**

The defendant above named, having this day filed its petition for a writ of error and supersedeas from the judgment heretofore entered herein against it

to the United States Circuit Court of Appeals for the Ninth Circuit, together with an assignment of errors, all in due time, and praying that an order be made fixing the amount of security which defendant shall furnish on said writ of error,—

IT IS HEREBY ORDERED that a writ of error herein is hereby allowed to have said judgment reviewed in the United States Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED, that upon said defendant filing with the Clerk of this Court a good and sufficient bond in the sum of Twenty Thousand (20,000) Dollars to the effect that if said defendant shall prosecute said writ of error to effect and answer all damages and costs if it fails to make its plea good, then said obligation to be void, otherwise to remain in full force and virtue, said bond being approved by this court, all further proceedings in this court shall be and they are hereby suspended and stayed until the determination of the said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: June 24th, 1921.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed June 24th, 1921. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[265]

(Title of Court and Cause.)

Bond.

KNOW ALL MEN BY THESE PRESENTS: That we, Douglas Fir Exploitation & Export Company, a corporation, as principal, and National Surety Company, a corporation, as surety, are held and firmly bound unto W. Leslie Comyn and Benjamin F. Mackall, copartners doing business under the firm name of Comyn, Mackall & Co., the plaintiffs above named, in the sum of Twenty Thousand (20,000) Dollars, to be paid to said W. Leslie Comyn and Benjamin F. Mackall, their heirs and assigns, to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 24th day of June, 1921.

WHEREAS, defendant above named has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment entered by the above-entitled Court in favor of plaintiff and against defendant in the sum of Seventeen Thousand Five Hundred Ninety-two and 72/100 (17,592.72) dollars:

Now, therefore, the condition of this obligation is such that if the above-named defendant shall prosecute said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise it shall be and remain in full force, virtue and effect.

WITNESS our seals and names hereto affixed
the 24th day of June, 1921.

DOUGLAS FIR EXPLOITATION & EX-
PORT COMPANY,

By A. A. BAXTER,
General Manager. [266]

NATIONAL SURETY COMPANY,

By FRANK L. GILBERT,
Resident Vice-President.

[Seal] Attest: A. C. ROBESON,
Resident Assistant Secretary.

State of California,
City and County of San Francisco,—ss.

On this 24th day of June, in the year one thousand
nine hundred and twenty-one, before me, John Mc-
Callan, a notary public in and for the said City and
County of San Francisco, residing therein, duly com-
missioned and sworn, personally appeared Frank
L. Gilbert and A. C. Robeson, known to me to be the
resident vice-president and resident assistant secre-
tary, respectively, of the National Surety Company,
the corporation described in, and that executed the
within instrument, and also known to me to be the
persons who executed it on behalf of the corpora-
tion therein named, and they acknowledged to me
that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set
my hand and affixed my official seal, at my office in
the City and County of San Francisco, the day and
year in this certificate first above written.

[Seal] JOHN McCALLAN,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires April 12, 1921.

The premium charged for this bond is \$90.46 per annum.

The foregoing bond is hereby approved this 24th day of June, 1921.

WM. C. VAN FLEET,
Judge. [267]

[Endorsed]: Filed Jun. 24, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [268]

(Title of Court and Cause.)

**Stipulation and Order Concerning Original
Exhibits.**

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that defendant's original exhibits, introduced in evidence at the trial of the above-entitled action and marked respectively Defendant's Exhibits "B," "C," "D" and "E," may be omitted both from the bill of exceptions and the transcript of record on appeal in said cause, and may be filed in the United States Circuit Court of Appeals for the Ninth Circuit in the original form in which said exhibits were introduced, and be considered as original exhibits in the transcript of record on appeal, and said exhibits need not be printed.

Dated May 3, 1921.

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiffs.

McCLANAHAN & DERBY,
CHICKERY & GREGORY,
Attorneys for Defendant.

It is so ordered.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed May 4, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [269]

(Title of Court and Cause.)

(Praecipe for Transcript on Writ of Error.)

To the Clerk of said Court:

Sir: Please prepare a transcript in the above-entitled case on writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, and including therein the following:

1. Complaint.
2. Demurrer to complaint.
3. Order of Court overruling demurrer to complaint.
4. Answer.
5. Demurrer to certain defenses set forth in answer.
6. Plaintiffs' motion to strike out certain parts of answer.
7. Order of Court sustaining said demurrer to answer.
8. Findings of fact and conclusions of law.
9. Judgment.
10. Petition for new trial.
11. Order of Court denying petition for new trial.
12. Engrossed bill of exceptions.
13. Petition for writ of error.

14. Order allowing writ of error.
15. Bond.
16. Assignment of errors.
17. Writ of error and copy and proof of service.
18. Citation and copy and proof of service.
19. Praecipe for transcript of record.

Also kindly transmit to said Circuit Court of Appeals, as original exhibits but not included within the transcript, the following documents: [270]
Defendant's Exhibits "B," "C," "D" and "E."

McCLANAHAN & DERBY,
CHICKERING & GREGORY,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 2, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [271]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,127.

W. LESLIE COMYN et al.,

Plaintiffs,

vs.

DOUGLAS FIR EXPLOITATION & EXPORT
CO., a Corporation,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, WALTER B. MALING, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing two hundred seventy-one (271) pages, numbered from 1 to 271, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$116.55; that said amount was paid by the defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 15th day of August, A. D. 1921.

[Seal] WALTER B. MALING,
Clerk United States District Court, Northern District of California. [272]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Southern Division of the Northern District of California, Second Division, GREETING:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Douglas Fir Exploitation & Export Company, a corporation, plaintiff in error, and W. Leslie Comyn and Benjamin F. Mackall, copartners doing business under the firm name of Comyn, Mackall & Co., defendants in error, a manifest error hath happened, to the great damage of the said Douglas Fir Exploitation and Export Company, a corporation, plaintiff in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, **that** then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held,

that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable JOSEPH McKENNA, Senior Associate Justice of the Supreme Court of the United States, the 24th day of June, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal]

WALTER B. MALING,
Clerk of the United States District Court, Northern
District of California.

By J. A. Schaertzer,
Deputy Clerk.

ALLOWED BY:

_____.

Receipt of a copy of the within writ of error is hereby admitted this 24th day of June, 1921.

PILLSBURY, MADISON & SUTRO,
Attorneys for Defendants in Error.

[Endorsed]: No. 16,127. In the Southern Division of United States District Court for the Northern District of California, Second Division. Douglas Fir Exploitation & Export Company, a Corp., Plaintiff in Error, vs. W. Leslie Comyn and Benjamin F. Mackall, Copartners, etc., Defendants in Error. Writ of Error. Filed Jun. 25, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [273]

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern
District of California. [274]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to W. Leslie Comyn and Benjamin F. Mackall, Copartners Doing Business Under the Firm Name of Comyn, Mackall & Co., GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of

error duly issued and now on file in the clerk's office of the United States District Court for the Southern Division of the Northern District of California, Second Division, wherein Douglas Fir Exploitation & Export Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. C. VAN FLEET,
United States District Judge for the Northern District of California, 2d Div'n, this 24th day of June,
A. D. 1921.

WM. C. VAN FLEET,
United States District Judge.

Receipt of a copy of the within Citation on Writ of Error is hereby admitted this 24th day of June, 1921.

PILLSBURY, MADISON & SUTRO,
Attorneys for Defendants in Error.

[Endorsed]: No. 16,127. In the Southern Division of United States District Court for the Northern District of California, Second Division. Douglas Fir Exploitation and Export Company, a Corporation, Plaintiff in Error, vs. W. Leslie Comyn and Benjamin F. Mackall, Copartners, etc., Defendants in Error. Citation on Writ of Error. Filed Jun. 25, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [275]

[Endorsed]: No. 3753. United States Circuit Court of Appeals for the Ninth Circuit. Douglas Fir Exploitation & Export Company, a Corporation, Plaintiff in Error, vs. W. Leslie Comyn and Benjamin F. Mackall, Copartners Doing Business Under the Firm Name of Comyn, Mackall & Company, Defendants in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed August 17, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,127.

W. LESLIE COMYN and BENJAMIN F. MACK-
ALL, Copartners Doing Business Under the
Firm Name of COMYN, MACKALL & CO.,
Plaintiffs,

vs.

DOUGLAS FIR EXPLOITATION & EXPORT
COMPANY, a Corporation,
Defendant.

**Order Extending Time to and Including August 24,
1921, to File Record and Docket Cause.**

GOOD CAUSE APPEARING THEREFOR, it is hereby ORDERED that the time within which defendant and plaintiff in error may file the record of the above-entitled case in the Circuit Court of Appeals and docket said cause in said court is extended to and including the 24th day of August, 1921.

Dated: July 22d, 1921.

WM. W. MORROW,
U. S. Circuit Judge.

[Endorsed]: 3753. No. 16,127. In the Southern Division of the United States District Court, Northern District of California, Second Division. W. Leslie Comyn and Benjamin F. Mackall, Copartners Doing Business Under the Firm Name of Comyn, Mackall & Co., Plaintiffs, vs. Douglas Fir Exploitation & Export Company, a Corporation, Defendant. Order Extending Time for Docketing Case. Filed Jul. 22, 1921. F. D. Monckton, Clerk. Refiled Aug. 17, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for
the Ninth Judicial Circuit.

No. 3753.

DOUGLAS FIR EXPLOITATION & EXPORT
COMPANY, a Corporation,

Plaintiff in Error,

vs.

W. LESLIE COMYN and BENJAMIN F. MACK-
ALL, Copartners Doing Business Under the
Firm Name of COMYN, MACKALL & CO.,
Defendants in Error.

**Stipulation Waiving Printing of Original Exhibits
and of Exhibit "A" Attached to Complaint.**

It is hereby stipulated and agreed that Defendant's Exhibits "B," "C," "D" and "E," sent up to the above-entitled court as original exhibits, and also the book marked "G List," attached to plaintiffs' complaint as Exhibit "A," need not be printed, but that the same may be considered as a part of the record even though not printed.

Dated, August 17th, 1921.

E. B. McCLANAHAN,
S. HASKET DERBY,
WARREN GREGORY,

Attorneys for Plaintiff in Error.

PILLSBURY, MADISON & SUTRO,

Attorneys for Defendants in Error.

So ordered.

WM. W. MORROW,
U. S. Circuit Judge.

[Endorsed]: No. 3753. In the United States Circuit Court of Appeals for the Ninth Judicial Circuit. Douglas Fir Exploitation & Export Co., a Corp., Plaintiff in Error, vs. W. Leslie Comyn and Benjamin F. Mackall, etc., Defendants in Error. Stipulation Waiving Printing of Original Exhibit "A" Attached to Complaint. Filed Aug. 18, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

